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No. 86-964-CFX
Status: GRANTED

Title: David A. Thompson, Petitioner
v.
Susan A. Thompson, aka Susan A. Clay

Docketed:
December 8, 1986

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Weiss, Ronald W.

Counsel for respondent: Rigby, Kenneth

| Entry | Date | Note | Proceedings and Orders |
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| 1 | Dec 8 1986 | G | Petition for writ of certiorari filed. |
| 2 | Jan 2 1987 | | Brief amicus curiae of California, et al. filed. |
| 3 | Jan 5 1987 | | Brief of respondent Susan A. Thompson in opposition filed. |
| 4 | Jan 7 1987 | | DISTRIBUTED. January 23, 1987 |
| 5 | Jan 27 1987 | | Petition GRANTED. |
| | | | ********** |
| 6 | Mar 12 1987 | G | Motion of Sacramento County, California, et al. for leave to file a brief as amici curiae filed. |
| 7 | Mar 13 1987 | G | Motion of Women's Legal Defense Fund, et al. for leave to file a brief as amici curiae filed. |
| 8 | Mar 13 1987 | | Brief of petitioner David A. Thompson filed. |
| 9 | Mar 13 1987 | | Joint appendix filed. |
| 10 | Mar 23 1987 | | Motion of Sacramento County, California, et al. for leave to file a brief as amici curiae GRANTED. |
| 11 | Mar 30 1987 | | Motion of Women's Legal Defense Fund, et al. for leave to file a brief as amici curiae GRANTED. |
| 12 | Apr 15 1987 | | Brief of respondent Susan A. Thompson filed. |
| 13 | Jul 17 1987 | | CIRCULATED. |
| 14 | Jul 20 1987 | | SET FOR ARGUMENT. Tuesday, October 6, 1987. (2nd case). |
| 15 | Jul 22 1987 | | Record filed. |
| 16 | Sep 25 1987 | X | Supplemental brief of respondent Susan A. Thompson filed. |
| 17 | Oct 6 1987 | | ARGUED. |

# PETITION FOR WRIT OF CERTIORARI

86-964

No.

Supreme Court, U.S.
FILED
DEC 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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**DAVID A. THOMPSON,**

*Petitioner,*

*vs.*

**SUSAN A. THOMPSON, aka,**
**SUSAN A. CLAY,**

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

DOES THE PARENTAL KIDNAPPING PREVENTION ACT OF 1980, 28 U.S.C. § 1738A (1982) FURNISH A PRIVATE CAUSE OF ACTION IN FEDERAL COURT TO DETERMINE WHICH OF TWO SISTER STATES ENTERING CONFLICTING CHILD CUSTODY DECREES SHOULD HAVE JURISDICTION OVER THE CHILD CUSTODY PROCEEDINGS?

## LIST OF PARTIES

The parties to the proceedings below were the Petitioner, DAVID A. THOMPSON, and the Respondent, SUSAN A. THOMPSON, aka, SUSAN A. CLAY.

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No. _____

**In The**
**SUPREME COURT OF THE UNITED STATES**
**October Term, 1986**

**DAVIS A. THOMPSON,**
*Petitioner,*

*vs.*

**SUSAN A. THOMPSON, aka,**
**SUSAN A. CLAY,**
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI

The Petitioner, DAVID A. THOMPSON, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on September 10, 1986.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 798 F.2d 1547. A copy of the opinion as rendered by the Court is reprinted in the Appendix A hereto, *infra.*

The Order of Dismissal of the United States District Court for the Central District of California (The Honorable A. Andrew Hauk, Senior Judge Presiding) has not been reported. It is reprinted in Appendix A, page A-39, *infra.*

## JURISDICTION

Petitioner David A. Thompson (David) invoked subject matter jurisdiction under 28 U.S.C. §1738A (Parental Kidnapping Prevention Act of 1980 (hereinafter PKPA or Section 1738A)) and 28 U.S.C. §1331, invoking Federal Question Jurisdiction. David sought declaratory and injunctive relief but did not cite 28 US.C. §§ 2201 and 2202 as specific authority.

Personal jurisdiction was obtained over Respondent Susan A. Thompson, aka Susan A. Clay (hereinafter Susan) when Susan purposefully availed herself of the protection and benefits of California by instituting the underlying action for dissolution of marriage and for child custody. David's action for enforcement of Section 1738A is direactly related to Susan's original California custody action.

On David's appeal, the Ninth Circuit on September 10, 1986, entered a Judgment and opinion affirming the Central District's Order. No Petition for rehearing or for hearing en banc was sought.

The jurisdiction of this Court to review the Judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

## STATUTES INVOLVED

28 U.S.C §1738A:

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a Court of another State:



(b) As used in this section, the term --

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person including a parent, who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modifications" and "modify" refer to a custody determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child; and

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

(c) A child custody determination made by a Court of a State is consistent with the provisions of this section only if --

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been



subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the Court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the Child or any contestant.

(e) Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if --

(1) it has jurisdiction to make such child custody determination; and

(2) the Court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.

28 U.S.C. §2201

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S C. §2202

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

## STATEMENT OF THE CASE

This case arises out of the entry of conflicting child custody decrees by California and Louisiana State courts.

In 1979, Susan commenced action in Los Angeles, California Superior Court seeking dissolution of her



marriage to David and custody of their son, Matthew. While a court services investigation was being conducted and with future hearings pending to determine final custody of Matthew, the Superior Court awarded temporary joint legal custody, granted Susan permission to move to Louisiana with Matthew, and gave her temporary physical custody.

In December, 1980, Susan and Matthew moved and in March, 1981, Susan commenced Louisiana custody proceedings. In April 1981, chosing to ignore the ongoing California proceedings, Louisiana granted sole custody of Matthew to Susan. Shortly thereafter the California court completed its investigation and hearings and awarded sole custody of Matthew to David.

In August, 1983, David filed a complaint in the United States District Court, Central District of California, seeking a declaratory judgment, pursuant to PKPA, that the Louisiana judgment was void and that all custody matters should be properly decided by California

After personal service, Susan brought a Motion to Dismiss David's complaint on the basis that (1) the District Court lacked subject matter jurisdiction and (2) the District Court lacked personal jurisdiction over Susan.

In March, 1984, the District Court granted Susan's Motion. The Order dismissing the complaint was entered on April 10, 1984.

On May 3, 1984, David filed a Notice of Appeal from that Order to the Ninth Circuit.

On September 10, 1986, the Ninth Circuit filed its opinion affirming the District Court's order. David has filed no petition for rehearing or hearing en banc.

## REASONS FOR GRANTING THE WRIT

### I.

### THE DECISION BELOW, THAT PARENTS SUBJECT TO CONFLICTING STATE CUSTODY DECREES MAY NOT SEEK PRIVATE RELIEF IN FEDERAL COURT TO DETERMINE WHICH DECREE IS VALID AND ENFORCEABLE UNDER THE PARENTAL KIDNAPPING PREVENTION ACT OF 1980, 28 U.S.C. §1738A (1982) RAISES IMPORTANT AND UNRESOLVED PROBLEMS.

The opinion of the Ninth Circuit, that private parties have no right under the PKPA to private relief in Federal Court to enforce one of two conflicting State custody decrees, raises important and unresolved issues:

A. Does lack of enforceability by private parties render the PKPA nugatory;

B. What remedies are available, other than resorting to self-help, to private parties with conflicting State custody decrees;

C. On what grounds can the PKPA be enforced; and

D. Who can seek to enforce the PKPA.



### A.

### LACK OF ENFORCEABILITY BY PRIVATE PARTIES RENDERS THE PKPA NUGATORY

If the Ninth Circuit's majority opinion is correct then Congress has imposed upon "the appropriate authorities of every State" the apparently optional enforcement of the PKPA and has deprived the involved parents of any lawful means of enforcing either of two conflicting State decrees.

The opinion will result, not in a diminishment of litigation but a proliferation of litigation as the custody losing parent in the first State court action forum shops and eventually finds some other State which will grant him/her custody of the child(ren).

This interpretation only continues the sad state of confusion and forum shopping which existed prior to the enactment of the PKPA and does nothing to correct the problems addressed at the hearings before Congress or by the PKPA itself (see Page A-13 of the Appendix opinion).

The opinion of the majority and of the Seventh and D.C. Circuits have failed to grasp that the Federal Courts are "not asked to enter a child custody decree or to enforce an interstate custody decree, but rather, the inquiry is limited to the question of determining which State has failed to comply with the jurisdictional prerequisites of Section 1738A. . . ." (dissenting opinion by Justice Alarcon, Page A-36 of the appended opinion; 798 F.2d at Page 1562.

Further, the Court is being asked to exercise an already existing authority under 28 U.S.C. §§ 2201, and 2202 to enjoin the violating State from future non-compliance.

The dissenting opinion in *Bennett v. Bennett*, 682 F.2d 1039 (D.C. Cir. 1982) at 1045 stated, in opposing a decision similar to the Ninth Circuit's, that:

> "The majority correctly notes that federal courts generally lack 'the power to *determine* the custody of children.' (emphasis added) It simply does not follow from this premise, however, that a federal court is powerless to enforce an otherwise valid state custody decree in a diversity action. Enforcement of a valid and final state decree does not require a federal court to inquire into the present best interest of minor children; rather, the federal court need only give effect to the binding decision of a state court. Admittedly, a federal court may occasionally have to decide which of two conflicting state decrees is valid; but, as the majority concedes in its discussion of appellant's claim for damages, 'the task of determining such validity and effect is ... not beyond the competence of the federal courts.'"

David respectfully submits that the Ninth Circuit's interpretation of the PKPA renders this important legislation ineffective rhetoric.

**B.**

**PRIVATE PARTIES ARE NOW WITHOUT ANY MEANS, OTHER THAN SELF-HELP, FOR ENFORCING A VALID CUSTODY DECREE.**

> "Every year between 25,000 and 100,000 children of broken marriages are kidnapped by a parent attempting forcibly to obtain custody over a child



> living with the other parent. The emotional cost of this 'child snatching' - which must be borne in large measure by young persons who have already watched their parents' marriage fail and their families split asunder - is overwhelming."
> *Flood v. Braaten*, 727 F.2d 303, 304 (3rd Cir. 1984)

The Ninth Circuit's interpretation of the PKPA leaves thousands of effected parents with no lawful means of enforcing a valid custody decree as one parent snatches the child(ren) and flees to another more supportive jurisdiction. As a result, annually some small percentage of the effected parents resort to self-help in attempting to recover the child(ren). These attempts at self-help can, in the atmosphere of confusion and despair which has been created by the inaction of the Federal Courts, sometimes result in the use of private investigators or even force and violence as the desperate parent tries to regain custody of the child(ren). Such was the case here as David, in the wake of uncertainty created by the Federal Courts, attempted to recover his child. Such self-help endangers not only the parents and innocent children but also innocent bystanders and responding law enforcement personnel. It is only a matter of time before someone is unnecessarily injured.

All of this danger, all of this despair and needless emotional injury can be avoided by the Federal Courts merely exercising already existing authority (the Declaratory Judgments Act) and the issuance of an injunction to prevent the non-PKPA complying State from becoming involved in the action between the parents and the already involved State court.

## C.

## THE NINTH CIRCUIT'S OPINION GIVES THE VARIOUS STATES THE AUTHORITY TO OPTIONALLY COMPLY WITH THE PKPA PROVISONS.

> ". . . Congress was well aware that the UCCJA imposed standards only upon State courts and was enforceable only in such courts. The obvious inference is that Congress intended the duty imposed by Section 1738A also to fall only upon the State courts and to be enforceable only in those courts, and not in federal courts." (See the appended opinion Page A-17).

The majority opinion notes that the "State courts are encouraged" (Page A-11 of the appended opinion) to comply with terms of the PKPA thereby giving the impression that the "appropriate State authorities" have an option to refrain from PKPA violations. This interpretation of the statute renders it ". . . a toothless declaration of unenforceable platitudes" (Page A-34 of the appended opinion).

David respectfully asserts that the Ninth Circuit's opinion, if allowed to stand, destroys and ignores the Congressional intent to create order and sanity in an area of otherwise political and domestic confusion by providing no means for the parties to enforce the PKPA and allowing the States to optionally enforce it.



## II.

## THE DECISIONS OF THE NINTH, SEVENTH AND DISTRICT OF COLUMBIA CIRCUITS ARE NOW IN CONFLICT WITH THE DECISIONS OF THE THIRD, FOURTH, FIFTH AND ELEVENTH CIRCUITS AND THIS MATTER IS THEREFORE APPROPRIATE FOR CERTIORARI REVIEW.

The decision of the Ninth Circuit in this matter concurs with the opinions of the majority in the District of Columbia and the Seventh Circuits in ruling that private parties have no private cause of action in Federal courts to enforce the PKPA and any existing valid State custody decree. *See Lloyd v. Loeffler*, 694 F.2d 489, 493 (7th Cir. 1982); *Bennett v. Bennett*, 682 F.2d 1039, 1043 (D.C. Cir. 1982).

The Third, Fourth, Fifth and Eleventh Circuits have held to the contrary. *See Flood v. Braaten*, 727 F.2d 303 (3rd Cir. 1984); *DiRuggiero v. Rodgers*, 743 F.2d 1009 (3rd Cir. 1984); *Wasserman v. Wasserman*, 671 F.2d 832 (4th Cir. 1982); *Hickey v. Baxter*, 800 F.2d 430 (4th Cir. 1986); *Heartfield v. Heartfield*, 749 F.2d 1138 (5th Cir. 1985); and *McDougald v. Jenson*, 786 F.2d 1465 (11th Cir. 1986).

As the Third Circuit stated in *Flood, supra*, at Page 310:

> "Because Section 1738A permits only one state at a time to assert jurisdiction, a federal court could in certain cases enforce a decree without becoming enmeshed in the underlying custody dispute. For under the rules defined by Section 1738A, if two states concurrently render custody decrees, one state has asserted jurisdiction in violation of federal law. Identifying that errant state under Section

1738A requires only preliminary inquiry into jurisdictional facts."

Each of the circuits reaching a conclusion contrary to the Ninth Circuit, as well as the dissenting opinions in the Ninth and D.C. Circuits, has recognized that the authority to determine which state is in violation of the PKPA already existed and that the same authority existed to remedy any violation without becoming directly involved in the custody determination itself. That authority, as noted above, is the Declaratory Judgments Act, 28 U.S.C. §§ 2201 and 2202.

The Third, Fourth, Fifth and Eleventh Circuits have recognized a private right to enforce a valid custody decree against a child snatching non-custodial parent. This will, in the long run, reduce litigation not only in the State Courts, but eventually in the Federal Courts as parents learn to deal with custodial matters in the already involved Court rather than moving to a more favorable State Court.

The opinions of the Ninth, D.C. and Seventh Circuits on the other hand have announced to all non-custodial parents that the possibility exists within those circuits that the non-custodial parent could snatch his/her child and might obtain a favorable decree from a State Court which chose to ignore the sister state decree and the PKPA regulations.

A United States statute is now being construed differently in a directly contradictory fashion and there exists an urgent need for a single uniform interpretation and enforcement of this statute which has potential impact upon millions of divorced parents and their children.

Since there is such a division of opinion between the circuits, this matter is proper for certiorari review by this Court.



## PENDENCY OF ADDITIONAL PETITIONS FOR CERTIORARI REVIEW ON THE SAME ISSUES.

Petitioner is informed that the Fourth Circuit Opinion of *Hickey v. Baxter, supra,* may be presented for review shortly after this petition is presented. Additionally, the Eleventh Circuit opinion of *McDougald v. Jenson, supra,* is concurrently before this Court for reconsideration of the denial of the Petition for Writ of Certiorari.

Consideration of this statute has now become a matter of national importance with several cases simultaneously ripe for consideration and a diversity of Appellate Court opinions which need the unifying guidance of this Court.

## CONCLUSION

David has now been denied the custody of his child for approximately five years and it is time that some finality be accorded the matter. Just as importantly, thousands of other custodial parents are being denied the custody, and in most cases are being denied any contact whatsoever by the snatching parent, of their loved children.

Congress appears to have believed that this situation would have been corrected upon the passage of the PKPA, but such has not been the case. It is now up to this Court to determine if the PKPA is to be the unifying standard it was hoped to be.

For all of the various reasons presented above, this Petition for Certiorari should be granted.

DATED: December 5, 1986

Respectfully submitted

RONALD W. WEISS
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Petitioner

# APPENDIX

**FOR PUBLICATION**
**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**FILED**
SEP 10 1986
Cathy A. Catterson, Clerk
U.S. Court of Appeals

**DAVID A. THOMPSON,**
*Plaintiff-Appellant,*

vs.

**SUSAN A. THOMPSON, aka SUSAN A. CLAY,**

*Defendant-Appellee.*

No. 84-5890

D.C. No.
CV 83-5221-AAH

**OPINION**

Appeal from the United States District Court
for the Central District of California
A. Andrew Hauk, District Judge, Presiding
Argued April 2, 1985 - Pasadena, California
Submitted January 9, 1986

Before: BROWNING, Chief Judge, ALARCON, Circuit Judge, and SOLOMON,* District Judge.

PER CURIAM:

This appeal raises an issue of first impression in this circuit: whether parents subject to conflicting state child custody decrees may seek relief in federal court to determine which decree is valid and enforceable under the

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* Honorable Gus J. Solomon, Senior Judge, United States District Court for the District of Oregon, sitting by designation.

Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (1982) [hereinafter PKPA or section 1738A].

## I.

In 1979, Susan Clay Thompson (Susan) commenced proceedings in the California Superior Court for dissolution of her marriage to David A. Thompson (David) and determination of custody of their minor child Matthew. In the fall of 1979 the California court awarded the Thompsons joint custody of Matthew. In November of 1980, one or both parties initiated additional proceedings in the California court [1] which culminated in entry of the following judgment on December 4, 1980:

> Present order of custody remains in effect until petitioner moves to Louisiana; then custody shall be sole with her without prejudice.[2]

The court also ordered the court investigator to conduct an investigation into custody issues, to be concluded by April of 1981. On December 12, 1980, Susan and Matthew moved to Louisiana with the court's permission.

On March 24, 1981, Susan filed a petition in Louisiana state court for the filing an enforcement of the California custody decree, for judgment of custody, and for modification of David's visitation privileges based upon allegations

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[1] Because the full state court record was not made a part of our record, it is unclear who initiated the 1980 proceedings or what the precise issue at those proceedings was. David alleges he filed a petition requesting sole custody. Susan asserts she filed a motion to obtain the court's permission to move to Louisiana with Matthew.

[2] David maintains the award of sole custody to Susan was temporary pending conclusion of the court-ordered investigation, and concludes the California proceeding was still pending when Susan moved to Louisiana. Susan construes the award as permanent, apparently assuming the investigation was undertaken solely with regard to David's visitation rights.



of child abuse and mistreatment. The Louisiana court granted Susan's petition by order dated April 7, 1981, awarding sole custody of Matthew to Susan.

On June 15, 1981, following its review of the court investigator's report, the California court awarded sole custody of Matthew to David, and "retain[ed] jurisdiction until Petitioner's [Susan's] death, remarriage or further order of the court." On August 12, 1983, David filed a complaint for declaratory and injunctive relief in the District Court for the Central District of California. He sought an order declaring the Louisiana decree invalid, and the 1981 California decree valid, and requiring that all custody disputes be determined by the appropriate California state court until California issues a permanent custody decree. He also sought an injunction against enforcement of the Louisiana decree. The district court granted Susan's motion to dismiss the complaint for lack of subject matter and personal jurisdiction. David appeals.

## II.

The district court pointed to a lack of personal jurisdiction over Susan as a ground for its dismissal of David's complaint. Lack of personal jurisdiction would prevent us from considering the merits of David's claims. *See Kulko v. Superior Court*, 436 U.S. 84, 91 (1978); *Rankin v. Howard*, 633 F.2d 844, 848-49 (9th Cir. 1980).

In *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977), we summarized the circumstances in which personal jurisdiction will properly lie:

> If . . . the [nonresident] defendant's activities are not so pervasive as to subject him to general jurisdiction, the issue whether jurisdiction will lie turns

> on an evaluation of the nature and quality of the defendant's contacts in relation to the cause of action. In our circuit, we use the following approach in making this evaluation: (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws. (2) The claim must be one which arises out of or results from the defendants' forum-related activities. (3) Exercise of jurisdiction must be reasonable.

*See also Varsic v. United States District Court*, 607 F.2d 245, 249 (9th Cir. 1979).

The nature and quality of Susan's activities in California persuade us that the requisite minimum contacts are present. First, Susan purposefully availed herself of the privilege of conducting her activities in California when she invoked the benefits and protections afforded by California law by intitating an action for dissolution and child custody. Second, David's action for enforcement of section 1738A is directly related to Susan's original California custody action.

Finally, we think that the exercise of jurisdiction in the Central District is reasonable in the circumstances of this case. California was Susan's marital domicile prior to the dissolution of her marriage; Matthew was born in California and resided there; Susan initiated dissolution and custody proceedings in California; the dissolution was a California judgment; and the custody order which permitted Susan to relocate to Louisiana and which Susan sought to modify in Louisiana was made by the California court.



*See Bergan v. Bergan*, 114 Cal.App.3d 567, 570-71, 170 Cal.Rptr. 751 (1981).

## III.

The district court erred in dismissing David's complaint for lack of subject matter jurisdiction. David's complaint alleges a violation of a federal statute, 28 U.S.C. § 1738A. Federal question jurisdiction exists unless the cause of action alleged is patently without merit, *see Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 70-71 (1978), or the allegation is clearly immaterial and made solely for the purpose of obtaining jurisdiction. *See Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 279 (1977). The court must assume jurisdiction to decide whether the complaint states a cause of action on which relief can be granted. *Bell v. Hood*, 327 U.S. 678, 682 (1946). Because jurisdiction is not defeated by the *possibility* that the complaint might fail to state a claim upon which recovery can be had, the failure to state a valid claim is not the equivalent of a lack of subject matter jurisdiction, and calls for a judgment on the merits rather than for a dismissal for lack of jurisdiction. *Rodriquez v. Flota Mercante Grancolombiana, S.A.*, 703 F.2d 1069, 1072 (9th Cir.), *cert. denied*, 104 S. Ct. 84 (1983).

## IV.

As a threshold matter, we must determine whether the PKPA applies to this case. Susan contends the PKPA did not become effective until July 1, 1981, and consequently does not control the Louisiana custody proceedings initiated on March 24, 1981 which culminated in the court's judgment on April 7, 1981.

The PKPA was enacted as a part of Pub. L. No. 96-611, which provides: "The amendments made by this Act shall take effect on, and apply to services furnished on or after, July 1, 1981." Pub. L. No. 96-611, Parental Kidnapping Prevention Act § 2, 94 Stat. 3566, 3567 (1980). Although at first glance this provision seems dispositive, our analysis of the statute as a whole persuades us otherwise. Sections 1 through 5 and section 11 of Pub. L. No. 96-611 contain technical amendments to the Social Security Act which are unrelated to the PKPA. Moreover, the placement of the PKPA's short title indicates that the PKPA was intended as a separate and distinct Act. The short title of the PKPA appears midway through Pub. L. No. 96-611 (immediately preceding section 6 of the statute). The location of the short title in the body of an Act is usually as near to the beginning of the Act as possible. 1A Sands, Sutherland Statutory Construction, § 20.11 (4th rev. ed. 1985) [hereinafter *Sutherland*]. Therefore, the fact that the PKPA's short title appears after section 2, the provision containing the effective date for Pub. L. No. 96-611, indicates that the PKPA was intended as a separate act not subject to the section 2 effective date.

The inapplicability of the July 1, 1981 effective date to the PKPA becomes clearer when the manner of the PKPA's passage is considered. The PKPA, a bill contemplated by Congress for several years, was finally passed by the Senate when its chief sponsor, Senator Malcolm Wallop, on the floor of the Senate added the PKPA as a rider to a bill on pneumococcal vaccines. See 126 Cong. Rec. 33928-29 (1980). The July 1, 1981 effective date, referring to "services furnished," was part of the vaccine bill, not part of the PKPA.

Finally, although by its terms Pub. L. No. 96-611 did not become effective until July 1, 1981, the statute was enacted on December 28, 1980. Section 10 of the Act (a part of the



PKPA) requires the Attorney General to report to Congress 120 days after its enactment on the steps taken to comply with Congress' expressed intent that 18 U.S.C. § 1073 (1982) (prohibiting flight to avoid prosecution) apply to cases involving parental kidnapping and interstate or international flight. This provision plainly contemplates an effective date of December 28, 1980 for the PKPA; were we to hold that the PKPA did not become effective until July 1, 1981, we would ignore the Congressional reporting requirement imposed upon the Attorney General. Where a statute may be given a reasonable interpretation consistent with its language and legislative purpose, we need not give it a literal application which would lead to absurd results. Haggar Co. v. Helvering, 308 U.S. 389, 394 (1940); 2A Sutherland, supra, § 54.06 (4th rev. ed. 1984). We conclude section 1738A became effective upon its enactment date, December 28, 1980,[3] and therefore applies to this case.

## V.

The real issue here is whether David's complaint states a claim upon which relief could be granted.

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[3] Our conclusion is consistent with those of a number of state courts which have addressed the issue. *See, e.g., Marks v. Marks*, 281 S.C. 316, 315 S.E.2d 158, 160 n.4 (S.C.App. 1984); *Salisbury v. Salisbury*, 657 S.W.2d 761, 766 (Tenn.App. 1983); *Belosky v. Belosky*, 97 N.M. 365, 640 P.2d 471, 472 (1982); *State Ex Rel. Valles v. Brown*, 97 N.M. 327, 639 P.2d 1181, 1183 (1981); *In re Custody of Ross*, 291 Or. 263, 630 P.2d 353, 362 n.20 (1981). *But cf. Kumar v. County Superior Court*, 32 Cal.3d 689, 186 Cal.Rptr. 772 (1982) (PKPA became effective on July 1, 1981, but may be retroactive); *In re Marriage of Leonard*, 122 Cal.App.3d 443, 460 n.10, 175 Cal.Rptr. 903 (1981) (PKPA became effective on July 1, 1981, and does not have retroactive application).

The PKPA requires states to accord full faith and credit to another state's child custody determination[4] made in compliance with the statute's provisions. 28 U.S.C. § 1738A(a). The statute sets forth the conditions under which a state may assert jurisdiction to enter its own child custody determination resulting in a modification[5] of the determination of the court of another state. The operative provisions of the PKPA are set out in the margin.[6]

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[4] Section 1738A(b)(3) defines a child custody determination as "a judgment, decree or other order of a court providing for the custody or visitation of a child, . . . includ[ing] permanent and temporary orders, and initial orders and modifications."

[5] A modification is "a custody determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody determination concerning the same child, whether made by the same court or not." 28 U.S.C. § 1738A(a)(5).

[6] Subsections (c) - (g) of section 1738A read:

(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if --

(1) Such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i)

(continued)



David contends Congress intended to give parents a cause of action in federal court for declaratory and injunctive relief to enforce compliance by state courts with the standards established by section 1738A. Susan contends

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(ftn. continued)

the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if --

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.

Congress intended to provide federal statutory standards binding upon state courts in affording full faith and credit to child custody decrees, but did not intend to create a cause of action in federal court for the enforcement of these standards.

To determine whether a particular cause of action exists under the statute, "our task is limited solely to determining whether Congress intended to create the private right of action," *Touche Ross & Co. v. Redington,* 442 U.S. 560, 568 (1979); and that we determine by looking to "the language of the statute itself," *id.*, and to the statute's legislative history. *Id.*, at 571-74.

From our examination of these materials we conclude the statute does not create a cause of action in federal court.

**A.**

The PKPA does not expressly authorize suit in federal court to enforce its provisions.

The language of the statute suggests no such cause of action was intended. The statute is directed at the states, and particularly state courts: "The appropriate authorities of every State shall . . . ;" "A court of a *State* may modify . . . ;" "A court of a *State* shall not exercise jurisdiction. . . ." 28 U.S.C. § 1738A(a), (f), (g) (emphasis added). In this respect the language mirrors that of the Full Faith and Credit Clause itself and of section 1738, the statutory embodiment of the Clause.

Congress' general purposes were also stated in terms of the state courts: "(1) promote cooperation between *State courts* . . . ;" and "(5) avoid jurisdictional competition and conflict between *State courts* . . . ." Pub. L. 96-611, § 7(c) (1) and (5), 94 Stat. at 3569 (emphasis added). Similarly, Congress provided: "In furtherance of the purposes of



section 1738A . . . *State courts* are encouraged" to give priority to custody proceedings and to award costs and expenses against child snatchers. Pub. L. 96-611, § 8(c), 94 Stat. at 357 (emphasis added). The language of the statutory findings is particularly significant. Congress noted the growing number of child custody and visitation cases in the courts of the "*States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.*" Pub. L. 96-611, § 7(a) (1), 94 Stat. at 3568 (emphasis added), *reprinted in* note following 28 U.S.C.A. § 1738A (West Supp. 1985), and "the failure *of the courts of such jurisdictions* to give full faith and credit to the judicial proceedings of the other jurisdictions." Id. at § 7(a) (4). "For those reasons," Congress found,

> it is necessary to establish . . . national standards under which *the courts of such jurisdictions [i.e.*, of the States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States] *will determine their jurisdiction to decide such disputes and the effect to be given by each such jurisdiction to such decisions by the courts of other such jurisdictions.*

Id. at § 7(b) (emphasis added). This language clearly states the duty of applying the statutory standards in determining jurisdiction is imposed upon the state courts themselves.

In contrast, nowhere in the statute is it stated or implied that the obligations imposed by section 1738A are to be imposed upon federal courts or are to be enforced by federal courts.

## B.

We turn to the background and legislative history of PKPA, which, as well be seen, supports the contention that Congress did not intend to create a cause of action in federal court for the enforcement of section 1738A.

The PKPA was adopted primarily to reduce the incentive for parental child-snatching created by refusal of a significant number of states to give effect to the child custody decrees of other states. Prior to enactment of the PKPA, a parent who lost a custody battle in one state had every incentive to snatch the child and move to another state to relitigate the custody issue. Often the snatcher would be rewarded with a favorable custody decree notwithstanding the existence of a conflicting custody decree from the original state.[7]

Such forum shopping was possible because states were not bound by the child custody decrees of sister states. It was not clear that the Full Faith and Credit Clause applied to custody determinations, *see Ford v. Ford*, 371 U.S. 187, 192 (1962), and even if it did, a state was bound by the prior custody decree of another state only to the extent that the courts of the state entering the decree would be bound, id. at 194. Because the state entering the decree might modify it freely as conditions affecting the child changed, the courts of another state were free to modify a child

[7] *Parental Kidnaping Prevention Act of 1979; Joint Hearing on S. 105 Before the Subcomm. on Criminal Justice of the Sen. Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Sen. Comm. on Labor and Human Resources*, 96th Cong. 2d Sess. 48 (1980) [hereinafter *PKPA Hearing*] (statement of Paul Michel, Acting Deputy Attorney General, Department of Justice); *see also Parental Kidnaping, 1979: Hearing Before the Subcomm. on Child and Human Development of the Comm. on Labor and Human Resources*, 96th Cong. 1st Sess. 166 (1979) [hereinafter *PK Hearing*] (statement of Senator Malcolm Wallop).



custody decree in the same way. *Id.* at 191 n.2[8]

In an attempt to deal with the problem, a number of states enacted the Uniform Child Custody Jurisdiction Act (UCCJA), 9 U.L.A. §§ 1-28 (1979), which established standards for selecting the appropriate state forum to determine custody, and imposed a duty on the enacting states to recognize and enforce its custody decree entered by such a state forum. The UCCJA proved unsatisfactory

[8] *Parental Kidnaping Prevention Act of 1979; Addendum to Joint Hearing on S. 105 Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 101 (1980) [hereinafter *PKPA Addendum*] (letter from Assistant Attorney General Patricia Wald to Rep. Peter Rodino):

> [S]ince child custody orders are continually subject to modification, a court deciding a custody case is not, as a federal constitutional requirement under current judicial interpretation of the Full Faith and Credit Clause, bound by a decree entered by a court of another state in an action involving the same parties. *See Halvey v. Halvey*, 330 U.S. 610; *Kovacs v. Brewer*, 356 U.S. 604; *Ford v. Ford*, 371 U.S. 187.

*See also PK Hearing, supra*, at 166 (statement of Sen. Wallop); *PKPA Hearing, supra*, at 48 (Statement of Paul Michel):

> [C]urrent law in many States encourages a parent who does not have custody to snatch the child from the parent who does and take the child to another State to relitigate the custody issue in a new forum. This kind of "forum shopping" is possible because child custody orders are subject to modification to conform with changes in circumstances. Consequently, a court deciding a custody case is not, as a Federal constitutional requirement of the full faith and credit clause, bound by a decree by a court of another State even where the action involves the same parties. . . . [Section 1738A] would eliminate the incentive for one parent to remove a minor child to another jurisdiction.

*See also id.* at 12-13 (statement of Sen. Wallop); *id.* at 40-42 (statement of Sen. Durenberger); *id.* at 96-97 (statement of Donald E. Clevenger, Fathers United for Equal Rights and the U.S. Divorce Reform); *id.* at 144-45 (statement of Russell M. Coombs, Professor of Law at Rutgers University).

for several reasons. A substantial number of states did not adopt the UCCJA, and thus continued to provide havens for child snatchers. *See PKPA Hearing, supra,* at 144 (statement of Prof. Coombs). Several states enacted variations on UCCJA undermining the uniformity essential to the elimination of forum-shopping. *Id.* Even among states that enacted identical provisions, variations in interpretation and application created a potential for dual exercise of jurisdiction and conflicting custody awards. *Id.* at 144-45. In adopting the PKPA, Congress sought to solve these problems by imposing upon all states a single uniform set of federal standards identical to those found in the UCCJA.

Several aspects of the PKPA's legislative history negate the conclusion that Congress intended to create a federal cause of action to enforce its terms, any more than the UCCJA itself created such a forum.

## C.

Committee hearings and floor debates, like the statute itself, reflect a uniform characterization of the section 1738A proposal as addressed to the *states* and imposing a new obligation upon *state* courts.[9]

In striking contrast, there is only one mention in the legislative materials of any role for the federal courts in the enforcement of PKPA.[10] That single reference, discussed

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[9] *See, e.g.*, H.R. Rep. No. 96-1401, 96th Cong., 2d Sess. 41; 126 Cong. Rec. 22806-08 (1980) (statement of Sen. Wallop); 125 Cong. Rec. 758 (1979) (statement of Sen. McGovern); *id.* at 738-9 (statement of Sen. Wallop); 125 Cong. Rec. 787 (1978) (statement of Sen. Thurmond); *PKPA Hearing, supra,* at 18 (statement of Rep. Bennett); *id.* at 15 (statement of Sen. Wallop); *PKPA Addendum, supra,* at 138-40 (submission of Sen. Wallop).

[10] This is true although federal involvement in implementing the statute is commented upon on a number of occasions, *see, e.g.*, 125 (continued)



in part II E below, occurred during the colloquy leading to the rejection of proposals by Congressman Fish to grant federal courts jurisdiction to enforce custody decrees. As will be seen, it strongly suggests section 1738A should not be read as providing a cause of action in federal court.

## D.

As noted, the problem identified by Congress was not the absence of a federal cause of action, but lack of uniform standards governing assertion of jurisdiction over child custody matters by state courts. In both committee hearings and floor debates, ineffectiveness of the Full Faith and Credit Clause in custody proceedings was repeatedly identified as the crux of the problem.[11] Congress' response was to provide in section 1738A that child custody

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Cong. Rec. 758 (1978) (statement of Sen. McGovern); *PKPA Hearing* at 20 (statement of Rep. Duncan); and the anticipated course of proceedings under section 1738A was described many times. *See, e.g.* 126 Cong. Rec. 22806 (1980) (statement of Sen. Wallop); *Legislation to Revise and Recodify Federal Criminal Laws: Hearings on H.R. 6869 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, pt. 2, 95th Cong., 2d Sess. 1004-05 (statement of Prof. Coombs) [hereinafter *Criminal Law Hearing*]; *PKPA Hearing, supra,* at 8 (statement of Sen. Wallop); *PKPA Addendum, supra,* at 139-40 (submission of Sen. Wallop); *PKPA Hearing, supra,* at 18 (statement of Rep. Bennett); *id.* at 40-41 (statement of Sen. Durenburger).

[11] *See e.g.* 126 Cong. Rec. 22817 (1980) (statement of Sen. Cranston); *id.* at 22818 (statement of Sen. Durenburger); 125 Cong. Rec. 758 (1979) (statement of Sen. McGovern); 124 Cong. Rec. 5726 (1978) (statement of Rep. Moss); *PKPA Hearing, supra,* at 40 (statement of Sen. Durenberger); *id.* at 18 (statement of Rep. Bennett); *id.* at 15-16 (statement of Sen. Wallop); *PKPA Addendum, supra,* at 138-40 (submission of Sen. Wallop); *Parental Kidnaping: Hearing on H.R. 1290 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 8 (1980) (statement of Rep. Fish) [hereinafter *H.R. 1290 Hearing*].

decrees must be accorded full faith and credit under the uniform standards provided by Congress, thus requiring states to honor the decrees of other states pursuant to a uniform set of federal rules.[12]

Congressional leaders pointed to the UCCJA as the model for section 1738A both in committee hearings and floor debate. Congress' intention was simply to adopt the UCCJA as a federal procedure applicable to all of the states. This is unmistakably clear from the statements of Senator Wallop in introducing the bill that became section 1738A.[13]

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[12] *See PKPA Addendum, supra,* at 138 (submission of Sen. Wallop); *PKPA Hearing, supra* at 15 (statement of Sen. Wallop); *id.* at 48 (statement of Mr. Michel); *PK Hearing, supra,* at 50 (statement of Prof. Bodenheimer).

[13] Senator Wallop said:

> The first section amends title 28 of the United States Code by adding a new section 1738A. The new provision requires State courts to give full faith and credit to custody decrees rendered by sister State courts consistently with the provisions of the bill. The provisions are modeled on the Uniform Child Custody Jurisdiction Act (UCCJA) . . .
>
> By adding new subsection 1738A, the Federal Government is, in effect adopting key provisions of the UCCJA for the entire country for purposes of interstate custody cases.

125 Cong. Rec. 739 (1979).

When Senator Wallop later offered section 1738A as an amendment to the proposed Domestic Violence Prevention and Services Act. H.R. 2977, 96th Cong., 2d Sess. (1980); S. 1843, 96th Cong., 2d Sess. (1980), he again said:

> The first section requires State courts to enforce and not modify the custody and visitation decrees of the States that have adopted the jurisdictional guidelines of the Uniform Child Custody Jurisdiction Act (UCCJA). Embodied in this bill are limited exceptions to this general rule, exceptions which are likewise to be found the in the UCCJA. I ask unanimous consent that the UCCJA be printed in full at the conclusion of my remarks.
>
> The PRESIDING OFFICER. Without objection, it is so ordered.

(continued)



The significance of the fact that section 1738A is a deliberate copy of the UCCJA is that Congress was well aware that the UCCJA imposed standards only upon state courts and was enforceable only in such courts.[14] The obvious inference is that Congress intended the duty imposed by section 1738A also to fall only upon the state courts and to be enforceable only in those courts, and not in federal courts.

The Supreme Court held long ago that the Full Faith and Credit Clause was not a source of federal jurisdiction.

> [The Full Faith and Credit Clause] only prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progess of a pending suit as to the faith and credit to be given by the court to the public acts, records and judicial proceedings of a State other than that in which the court is sitting. . . . [T]o invoke the rule which it

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> (See exhibit 2.)
>
> Mr. WALLOP. Because the Federal bill mirrors the UCCJA, a brief discussion of that act is relevant. . . .

126 Cong. Rec. 22807 (1980) (statement of Sen. Wallop).

After discussing the UCCJA and its relationship with proposed section 1738A, Senator Wallop continued:

> With the enactment of this section of the amendment, Congress will have accomplished what the Supreme Court on numerous occasions has declined to do — it will have established a rule of reason in multistate child-custody conflicts modeled upon the child custody law now in effect in the vast majority of the States. . . .

125 Cong. Rec. 22807-08 (1980) (statement of Sen. Wallop).

[14] *See PKPA Hearing, supra,* at 8, 15, 22 (statement of Sen. Wallop); *id.* at 18 (statement of Rep. Bennett); *id.* at 40 (statement of Sen. Durenberger); *PKPA Addendum, supra,* at 138-40 (submission of Sen. Wallop); *PK Hearing, supra,* at 167 (statement of Sen. Wallop); 126 Cong. Rec 22817 (1980) (statement of Sen. Cranston); *id.* at 22818 (statement of Sen. Durenberger); 124 Cong. Rec. 787 (1978) (statement of Sen. Thurmond). *See also* paragraph 3 of Wald letter, *infra,* n.16.

prescribes does not make a case arising under the Constitution or laws of the United States.

*Minnesota v. Northern Securities Co.*, 194 U.S. 48, 72 (1904); *see also* C. Wright, A. Miller & E. Cooper, 13B Federal Practice and Procedure 2d § 3563, at 50 (1984). With a single exception noted in the margin,[15] no court has held the Full Faith and Credit Clause or its implementing statute, section 1738, authorized private suit in federal district court to require a state court to give full faith and credit to the judgment of a court of another state. It seems highly unlikely Congress would follow the pattern of the Full Faith and Credit Clause and section 1738 by structuring section 1738A as a command to state courts to give full faith and credit to the child custody decrees of other states, and yet, without comment, depart from the enforcement practice followed under the Clause and section 1738. The reasonable assumption is that Congress intended the new statute to be implemented as the Full Faith and Credit Clause and its statutory manifestation, section 1738, have been implemented for two centuries.

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[15] The third circuit expressed a contrary view in *Flood v. Braaten*, 727 F.2d 303, 308 (3d Cir 1984), that "a federal court may decide whether a state judgment involving domestic relations is enforceable." However, none of the eight Supreme Court cases cited holds that a violation of the Full Faith and Credit Clause or section 1738 provides the basis for a cause of action in federal court. Seven of the cited cases were Supreme Court decisions reviewing decisions of *state* courts, not federal courts. If a state court refuses to honor the decision of a court of another state, review may ultimately be sought in the Supreme Court since a federal question is raised: the meaning of the Full Faith and Credit Clause or of section 1738; but none of the eight cases, nor any other case, suggests that instead of following this route, a litigant may file suit in a federal district court under section 1738 and obtain a determination that failure of a state court to enforce the decree of a court of another state violated the Full Faith and Credit Clause or section 1738. The eighth case cited in *Flood* was a diversity case. Thus all eight decisions involved state law causes of action.



## E.

While Congress was deliberating the PKPA's full faith and credit approach, proposals to create a federal cause of action to resolve interstate child custody disputes were submitted to Congress and rejected.

This is reflected in a letter addressed during Congressional consideration of PKPA to Representative Peter M. Rodino, Chairman of the Judiciary Committee of the House, by then Assistant Attorney General, now Circuit Judge, Patricia M. Wald, on behalf of the Department of Justice. The Wald letter, extensively quoted in the margin,[16]

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[16] This document, *reprinted in PKPA Addendum* at 101, reads in part as follows:

Dear Mr. Chairman:

This responds to your requests for the views of the Department of Justice on several bills intended to remedy the problem of "child snatching". For the reasons stated below, this Department could support a proposal imposing upon states a federal duty, under standards derived from the Uniform Child Custody Jurisdiction Act, to give full faith and credit to the custody decrees of other states if they meet certain criteria. We would oppose, however, the creation of a criminal penalty for "child snatching" or the creation of a federal forum for resolving custody disputes.

The Problem

The Full Faith and Credit Clause of the Constitution (Article IV, Section 1) provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State" and authorizes Congress "to prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." A child custody order, however, is subject to modification where changed circumstances warrant a different custody arrangement. Consequently, since child custody

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is the source material referred to most frequently in the legislative proceedings. It touches upon most of the

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orders are continually subject to modification, a court deciding a custody case is not, as a federal constitutional requirement under current judicial interpretation of the Full Faith and Credit Clause, bound by a decree entered by a court of another state in an action involving the same parties. *See Halvey v. Halvey*, 330 U.S. 610; *Kovacs v. Brewer*, 356 U.S. 604; *Ford v. Ford*, 371 U.S. 187. As a result, individuals who are unsuccessful (or who expect to be unsuccessful) in an action in one state will attempt to evade that state's jurisdiction by taking the child to another state and relitigating the custody issue there. The second state will often switch custody to the parent within its jurisdiction, thereby encouraging "child snatching" by rewarding the *de facto* physical custodian notwithstanding the existence of an order or decree to the contrary. The problem therefore has its basis in the fact that our form of government is a federation of states, each of which retains jurisdiction over domestic relations within its own boundaries. And domestic relations questions, particularly those involving child custody, have traditionally and exclusively been reserved to state courts, which have developed an expertise in such matters heretofore lacking in federal courts.

. . .

For all these reasons, we have concluded that the soundest approach to this problem is that adopted by the civil provisions of proposed 28 U.S.C. 1738A._/ In essence, this provision would impose on states a federal duty, under enumerated standards derived from the UCCJA, to give full faith and credit to the custody decrees of other states. Such legislation would, in effect, amount to federal adoption of key provisions of the UCCJA for all states for purposes of interstate custody cases, and would eliminate the incentive for one parent to remove a minor child to another jurisdiction and render unlikely the existence of conflicting custody determinations in different states. We believe that Congress' power under the Commerce Clause could sustain such legislation upon a properly substantiated record.

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factors relevant to a proper interpretation PKPA. The Department's letter divides legislative proposals pending in the Congress into three groups: (1) those that would make "child snatching" a crime; (2) those that "would amend title 28 of the Code to *grant jurisdiction to the federal courts to enforce state custody decrees*;" and (3) section 1738A, which "would *impose on states* a federal duty, under enumerated standards derived generally from the UCCJA, to give full faith and credit to the custody decrees of other states." (Emphasis added.) The Department of Justice opposed proposals in the second category in part because they "would increase the workload of the federal courts;" the Department endorsed section 1738A in part because it would not pose the same problems. *See also H.R. 1290 Hearing, supra,* at 138-40 (statement of Prof. Coombs). Congress acted in accordance with the Department's recommendations. Thus the choice now urged upon us has been presented to the Congress and resolved.

This is reflected also in proceedings before the Subcommittee on Crime of the Committee on the Judiciary of the House of Representatives. Representative Fish testified in

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Conclusion

In sum, then, the Department of Justice supports the enactment of legislation imposing upon states a duty, under standards derived from the Uniform Child Custody Jurisdiction Act, to give full faith and credit to the custody decrees of other states.

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_/ H.R. 988 also adopts a full faith and credit approach. We prefer the provisions of S. 1437.

support of bills he had introduced, H.R. 9913 and H.R. 11273, which conferred jurisdiction upon federal district courts over private suits to enforce custody decrees when children subject to the decrees were removed to other states.[17] Representative Conyers, Chairman of the Subcommittee, questioned Congressman Fish regarding the difference between these bills and the bill that became section 1738A, referred to in the colloquy as the "Bennett proposal":[18]

> **Mr. Conyers.** Could I just interject, the difference between the Bennett proposal [now section 1738A] and yours: You would have, enforcing the full faith and credit provision, the parties removed to a Federal court. Under the Bennett provision, his bill would impose the full faith and credit enforcement on the State court.
>
> It seems to me that that is a very important difference. The Federal jurisdiction, could it not, Mr. Fish, result in the Federal court litigating between two State court decrees; whereas, in an alternate method previously suggested,we would be

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[17] H.R. 9913, 95th Cong., 1st Sess. (1977) reads, in part:

> Each district court of the United States shall have jurisdiction under this section of any civil action brought by a parent or legal guardian of a child for enforcement of a custody order against a parent of the child who, in contravention of the terms of the custody order, has taken the child to a State other than the State in which the custody order was issued.

H.R. 11273, 95th Cong., 2d Sess. (1978), introduced by Rep. Fish in the second session of the 95th Congress, was an exact copy of H.R. 9913. H.R. 11722, 95th Cong., 2d Sess. (1978), introduced by Rep. Dornan, was substantially identical.

[18] Rep. Bennett's proposal, H.R. 1290, 96th Cong., 1st Sess. (1979), is practically identical to the enacted § 1738A, except that H.R. 1290 would also have created a federal criminal penalty for "child snatching."



> imposing the responsibility of the enforcement upon the State court, and thereby reducing, its seems to me, the amount of litigation.
>
> Do you see any possible merit in leaving the enforcement at the State level, rather than introducing the Federal judiciary?
>
> **Mr. Fish.** Well, I really think that it is easier on the parent that has custody of the child to go to the nearest Federal district court. . . .
>
> **Mr. Conyers.** Of course you know that the Federal courts have no experience in these kinds of matters, and they would be moving into this other area. I am just thinking of the fact that they have "speedy trial" considerations, antitrust, organized crime, the RICO statute, bankruptcy matters, and here on the average of a 21-month docket, you would now be imposing custody matters which it seems might be handled in the courts that normally handle that, especially if we are going to implement the Uniform Child Custody and Jurisdiction Act, which I think is salutary.
>
> **Mr. Fish.** Well, I am not going to presume to tell this committee which authored the Speedy Trial Act — and I served on the subcommittee with the chairman for a couple of years, and I am fully awrare that this does present a problem that we cannot duck; that it will add a burden to the Federal court system. . . .

*H.R. 1290 Hearing, supra*, at 14. Following this exchange the House Subcommittee approved the Bennett proposal, now section 1738A, and rejected the Fish proposals providing for enforcement in a federal forum.

## III.

Finally, the PKPA must be interpreted in light of the strong policies reflected in the domestic relations exception to diversity jurisdiction, resting on the principle that "[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States, and not to the laws of the United States." *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)).

In keeping with this principle, "federal courts must decline jurisdiction of cases concerning domestic relations when the primary issue concerns the status of parent and child or husband and wife." *Buechold v. Ortiz*, 401 F.2d 371, 372 (9th Cir. 1968); *see also Csibi v. Fustos*, 670 F.2d 134, 137-38 (9th Cir. 1982). Even when a federal question is presented, federal courts decline to hear disputes which would deeply involve them in adjudicating domestic matters. *See, e.g., Firestone v. Cleveland Trust Co.*, 654 F.2d 1212, 1215 (6th Cir. 1981); *Bergstrom v. Bergstrom*, 623 F.2d 517, 520 (8th Cir. 1980); *Huynh Thi Ahn v. Levi*, 586 F.2d 625, 632-34 (6th Cir. 1978); *Hernstadt v. Hernstadt*, 373 F.2d 316, 318 (2d Cir. 1967).

Appellant recognizes the weight of the policy considerations behind the domestic relations exception, and concedes that in adopting section 1738A Congress did not wish to involve federal courts in custody disputes. Appellant suggests, however, that this Congressional intention may be honored by limiting the federal cause of action under the PKPA to resolution of the jurisdictional facts — that is, determining which state court had jurisdiction under the statutory standard — leaving to the courts of that state the resolution of the merits of the custody dispute. The difficulty is not so easily avoided.



The PKPA is so structured that in a type of case likely to arise frequently, a federal court deciding which of two conflicting state court decrees is valid under the PKPA could not avoid becoming involved in the merits of the underlying dispute. Under section 1738A(c) (2) (C) (i), a state may have jurisdiction if "the child has been abandoned," and under section 1738A(c) (2) (C) (ii), a state may assert jurisdiction because "it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatement or abuse." In this very case Susan's petition to the Louisiana court alleges mistreatment and abuse of Matthew by his father. Whether or not subsections (f) and (g) would obviate the need to determine the truth of the allegations in this case,[19] it is incontestible that in any case in which the first state assumed jurisdiction under section 1738A(c) (2) (C) the federal court would be compelled to resolve the question of abandonment or mistreatment, a question that in all probability would also be highly relevant if not determinative in the resolution of the merits of the custody dispute. Absent a clear command from Congress, the longstanding prohibition against federal court involvement in such matters should not be disregarded.

---

[19] Subsections (f) and (g) might be read to mean that so long as the first state had and retains jurisdiction, no other state may modify the first state's decree or enter a decree of its own, even though the child has been abandoned in the second state or there is an emergency involving actual or threatened abuse of the child. Another interpretation is that the second state is permitted to act in the limited situations in subsection (C) despite initial and continuing jurisdiction in the first state.

## IV.

For these reasons we conclude the PKPA creates no cause of action enforceable in federal court, and appellant did not and could not state a cause of action under section 1738A in the court below.

The District of Columbia and Seventh Circuits, in *dicta*, have expressed the same view. *See Lloyd v. Loeffler*, 694 F.2d 489, 493 (7th Cir. 1982); *Bennett v. Bennett*, 682 F.2d 1039, 1043 (D.C. Cir. 1982). The Third, Fifth and Eleventh Circuits have held to the contrary. *See McDougald v. Jenson*, 786 F.2d 1465 (11th Cir. 1986); *Heartfield v. Heartfield*, 749 F.2d 1138 (5th Cir. 1985); *DiRuggiero v. Rodgers*, 743 F.2d 1009 (3d Cir. 1984); *Flood v. Braaten*, 727 F.2d 303 (3d Cir. 1984).

The Third, Fifth and Eleventh Circuits did not find direct support for their construction in the language or legislative history of the statute. Each rested its decision upon the conclusion that without a federal forum to enforce the restrictions imposed by the statute upon state courts those restrictions would be rendered "nugatory" and Congress' purpose would be "thwarted." *See McDougald*, 786 F.2d at 1477; *Heartfield*, 749 F.2d at 1141; *Flood*, 727 F.2d at 312.

We are not persuaded and, more to the point, there is no evidence that Congress was persuaded, that the states would disregard the solemn mandate of Congress so clearly expressed in section 1738A. As we have seen, the consideration found by these Circuits to be dispositive is nowhere reflected in the langauge of the statute or its legislative history. If members of Congress considered the possibility at all they may well have concluded that if such incidents occurred they would be rare and could be corrected by the Supreme Court review under 28 U.S.C.



§ 1257 (1982) without a substantial drain on the Court's limited resources.

**AFFIRMED.**

**FILED**
SEP 10 1986
Cathy A. Catterson, Clerk
U.S. Court of Appeals

*Thompson* v. *Thompson*, No. 84-5890

ALARCON, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority's analysis in Parts I, II, III, and IV of the opinion. I respectfully dissent from their view that parents subject to conflicting state child custody decrees may not seek relief in federal court to determine which decree is valid and enforceable under section 1738A of the PKPA. The majority has concluded that (1) Congress did not intend federal courts to have subject matter jurisdiction to adjudicate a claim under the PKPA in federal court, and (2) strong policies reflected in the "domestic relations" exception to diversity jurisdiction counsel against recognizing a federal cause of action enforceable in federal court under the PKPA.

The majority's construction of the PKPA directly conflicts with the holdings of three circuits. *McDougald v. Jenson*, 786 F.2d 1465 (11th Cir. 1986); *Heartfield v. Heartfield*, 749 F.2d 1138 (5th Cir. 1985); *Flood v. Braaten*, 727 F.2d 303 (3d Cir. 1984). These courts have concluded that the PKPA confers subject matter jurisdiction on federal courts to determine which of two states may properly exercise jurisdiction over a child custody dispute in accord with the standards set forth in the PKPA. *McDougald*, 786 F.2d at 1475; *Heartfield*, 749 F.2d at 1141; *Flood*, 727 F.2d at 312-13.

The majority's interpretation of the PKPA would convert an act of Congress into barren rhetoric. My examination of

the legislative history of the PKPA has convinced me that the well-reasoned analyses of the Third, Fifth, and Eleventh Circuits are consistent with Congress' intent in enacting the PKPA. I would reverse the order of dismissal of this action for lack of subject matter jurisdiction and direct the district court to conduct an evidentiary hearing to determine whether California or Louisiana has jurisdiction over this child custody matter.

## I. LEGISLATIVE HISTORY OF THE PKPA

The majority states that the legislative history of the PKPA reveals that Congress did not intend to create a cause of action in federal court for the enforcement of section 1738A. I disagree. I am persuaded after reading the legislative history of the Act that the drafters of the PKPA intended to confer subject matter jurisdiction on the federal courts to enforce compliance with section 1738A through the vehicles of declaratory and injunctive relief. A contrary construction of section 1738A would make state compliance with its provisions optional — a result which Congress could not have intended.

Section 1738A imposes on the states a federal duty, under standards derived from the UCCJA, to give full faith and credit to the custody decrees of other states. *Joint Hearing, supra,* at 48 (statement of Paul Michel, Acting Deputy Attorney General, Department of Justice); *Addendum to Joint Hearing, supra,* at 103 (letter from Assistant Attorney General Patricia Wald to Representative Peter Rodino). The legislative history demonstrates that Congress sought to enact a federal law to address an interstate problem which the states, acting on their own, appear powerless to resolve. *See Joint Hearing, supra,* at 4 (statement of Senator Alan Cranston) ("Although legal custody issues relating to divorce and child-custody



matters have traditionally been within the domain of the States and not the Federal Government, it is within the province of the Federal Government to resolve problems that are interstate in origin and which the States, acting independently, seem unable to resolve"); *id.* at 7 (statement of Senator Malcolm Wallop) ("While the traditional role of State law must be preserved in intrastate cases, we at the Federal level have a compelling responsibility to take the necessary and appropriate steps to assist States in resolving the complicated interstate . . . cases which they have been unable to adequately address themselves"); *id.* at 20 (statement of Congressman Robert Duncan) ("Though I would prefer to have this question addressed at the State level, it has not been . . . . We must not fear to use the Federal Government at an appropriate level when necessary").

The majority states that "the colloquy leading to the rejection of proposals by Congressman Fish to grant federal courts jurisdiction to enforce custody decrees . . . strongly suggests that section 1738A should not be read as providing a cause of action in federal court." I believe the majority has misinterpreted Congress' intent in rejecting Congressman Fish's proposed amendments. The discussion cited by the majority reflects an intent by Congress not to eliminate the judicially created "domestic relations" exception to diversity jurisdiction by enacting 1738A. Specifically, Congressman Fish proposed to amend 28 U.S.C. § 1332 to authorize diversity jurisdiction in custody cases and to eliminate the $10,000 minimum amount in controversy requirement. *See Parental Kidnapping: Hearing on H.R. 1290 Before the Subcomm. on Crime of the House Judiciary Comm.*, 96th Cong., 2d Sess. 9 (1980) (Statement of Congressman Hamilton Fish, Jr.). Congressman Fish's bill would have conferred jurisdiction on federal courts to enforce state custody decrees in the *first*

instance. There is a significant distinction between the creation of a federal forum for custody cases in the first instance, and the delineation of enforceable federal standards applicable to determine which state court may exercise its jurisdiction over a custody dispute. It does not necessarily follow, as the majority reasons, that because Congress rejected the notion that the federal court should determine which parent should be awarded the custody of a child, that Congress also intended to exclude any role for federal courts in determining which of two states properly exercised its jurisdiction to award custody of a child.

The Third Circuit made a comprehensive analysis of the legislative history of section 1738A in *Flood v. Braaten*, 727 F.2d 303, 310-12. It concluded that Congress must have intended the jurisdiction of the federal district courts to extend to such actions, as any other result would "render § 1738A virtually nugatory by so restricting the availability of a federal forum that state compliance with legislation would become optional." *Id.* at 312. The court summarized its conclusions regarding the import of the legislative history and congressional purpose behind section 1738A as follows:

> While it is clear that Congress did not want federal courts making custody determinations, and while it is also clear that Congress did not want federal courts enforcing custody decrees in the first instance, it is nevertheless apparent that Congress meant to create new federal law governing state court enforcement and modification of custody decrees. By enacting one set of rules binding all the states, Congress sought to eliminate the inconsistency and close the the loopholes that encouraged child snatching under the old system in which each state exercised unreviewable power to modify decrees. Absent some tribunal capable of enjoining



> violations of the strict and uniform requirements of § 1738A, the Congressional policy underlying the enactment would be thwarted.

*Id.* at 310; *accord Heartfield*, 749 F.2d at 1141 ("When the courts of two states assert that they have jurisdiction over a custody determination, it is clear that Congress' purpose in enacting the Act would be thwarted without some means of determining which state has the right to exercise its jurisdiction under the terms of the Act."); *McDougald*, 786 F.2d at 1475 ("an action seeking an authoritative federal construction of section 1738A to resolve a conflict concerning the validity of state court custody orders may be maintained in federal district court"); *see also DeRuggiero*, 743 F.2d at 1015 (claims alleging a violation of section 1738A arise under federal law within the meaning of 28 U.S.C. § 1331 if they allege injury caused by inconsistent interstate custody decrees); *Wyman v. Larner*, 624 F. Supp. 240, 243 (S.D. Ind. 1985) ("Federal courts have jurisdiction under the PKPA . . . to determine which of two inconsistent state court custody decrees is valid"); *Martinez v. Reed*, 623 F. Supp. 1050, 1051-52 (E.D. La. 1985) (a federal district court has federal question subject matter jurisdiction over a claim brought under the PKPA), *aff'd without opinion*, 783 F.2d 1061 (5th Cir. 1986). My independent examination of section 1738A's legislative history leads me to the same conclusion.

The legislative history of the PKPA shows that Congress sought to leave untouched a state's traditional role in deciding custody disputes while at the same time providing a nationwide standard for the assertion of state jurisdiction. In so doing, Congress created a mechanism for federal intevention to resolve interstate conflicts in enacting section 1738A. *See Joint Hearing, supra*, at 19 (statement of Congressman Robert Duncan) ("The proposal we

consider today is a paradigm of the problem of maintaining a Federal balance"); *Joint Hearing*, *supra*, at 145 (statement of Professor Russell Coombs, former member of the Senate Committee on the Judiciary, Professor of Law at Rutgers University) (section 1738A was enacted to provide "an adequate mechanism to insure that [UCCJA standards] are interpreted and applied by the States with such uniformity that parents will perceive no legal advantage in [child-snatching]").

The majority's construction of section 1738A will so restrict the enforceability of the rights created by section 1738A in this circuit so as to deny a meaningful remedy to litigants confronted with two conflicting state decrees. *Heartfield*, 749 F.2d at 1140; *see Flood*, 727 F.2d at 312 ("'To take away all remedy for the enforcement of a right is to take away the right itself'") (quoting *Poindexter v. Greenhow*, 114 U.S. 270, 303 (1885)). The interpretation given to section 1738A by the Third, Fifth and Eleventh Circuits fosters congressional intent and avoids the pitfall of a literal application of the statute as a toothless declaration of unenforceable platitudes.

## II. THE "DOMESTIC RELATIONS" EXCEPTION TO DIVERSITY JURISDICTION

The majority states that because federal courts "could not avoid becoming involved in the merits of the underlying [custody] dispute" by asserting subject matter jurisdiction to decide which of two conflicting state court decrees is valid under the PKPA, "the PKPA must be interpreted in light of the strong policies reflected in the domestic relations exception to diversity jurisdiction . . . ." I disagree.

The longstanding bar to *federal diversity* jurisdiction in domestic relations matters has no application to an action



predicated on *federal question* jurisdiction. "[T]he domestic relations exception *per se* applies only to actions in diversity." *Flood*, 727 F.2d at 307 (citing C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3609, at 662 (1975)). The law in this circuit, until today, has also recognized the pertinent distinction between applying the domestic relations exception to diversity actions and withholding it in federal question actions: "[D]omestic relations cases are within the Article III judicial power of the federal courts, but outside the power bestowed by Congress in the diversity statute." *Csibi*, 670 F.2d at 136 n.4. Stated another way, "as a jurisdictional bar, the domestic relations exception does not apply to cases arising under the Constitution or laws of the United States." *Flood*, 727 F.2d at 308 (footnote omitted).

The domestic relations exception to diversity jurisdiction has no application to cases arising under the PKPA. "The domestic relations exception to the jurisdictional grant has been given a narrow construction." *McIntyre v. McIntyre*, 771 F.2d 1316, 1317 (9th Cir. 1985) (citing *Peterson v. Babbitt*, 708 F.2d 465, 466 (9th Cir. 1983) (per curiam)); *see also* 13B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3609, at 471 (1984) (hereinafter Wright, Miller & Cooper). Only those actions most closely resembling historically "ecclesiastical" actions have been considered outside a federal court's jurisdiction.[1]

---

[1] The domestic relations exception originated from early judicial construction of the diversity statute now codified in 28 U.S.C. 1332. *Csibi*, 670 F.2d at 136 & n.5. The originally enacted diversity statute in 1789 conferred jurisdiction over "'suits of a civil nature in law or in equity.'" Wright, Miller & Cooper, *supra*, § 3609, at 460. That statutory description was construed to exclude domestic relations and probate matters which were heard in ecclestiastical courts at the time the diversity statute was drafted. *Id.*; *Csibi*, 670 F.2d at 136. Although the Revised Judicial Code of 1948, Act of June 25, 1948, § 1331, 62 Stat. 869 at 930, substituted the broader term "civil actions" in its description of diversity jurisdiction, the domestic relations exception has persisted because the courts have found it supported by

(continued)

*Csibi*, 670 F.2d at 137. This court in *Buechold* articulated the test for subject matter jurisdiction in domestic relations actions. *Id.* The federal courts "must decline jurisdiction of cases concerning domestic relations when the primary issue concerns the status of parent and child or husband and wife." *Buechold*, 401 F.2d at 372 (citations omitted). "It follows that the exception to jurisdiction arises in those cases where a federal court is asked to grant a decree of divorce or annulment, or to grant custody or fix payments for support, the rationale being that those actions are close to the historical concept of an ecclesiastical action and peculiarly within the province of the state courts." *McIntyre*, 771 F.2d at 1317-18 (citing *Csibi*, 670 F.2d at 137).

In a case arising under section 1738A, the primary issue is not the status of parent and child, i.e., the federal court is not asked to enter a child custody decree or to enforce an interstate custody decree, but rather, the inquiry is limited to the question of determining which state has failed to comply with the jurisdictional prerequisites of section 1738A. Section 1738A makes clear that only one state at a time may properly exercise custody jurisdiction. If two states concurrently render custody decrees, one state has asserted jurisdiction in violation of federal law. 28 U.S.C. §§ 1738A(f), (g); *see Flood*, 727 F.2d at 310. In an action under the PKPA in federal court, the district court is not asked to make an award of custody or visitation. Instead, the district court is called upon to identify which state has jurisdiction under the standards set forth in section 1738A. This task requires only a preliminary inquiry into jurisdictional facts. *DiRuggiero*, 743 F.2d at 1019-20; *Flood*, 727 F.2d at 310. The court in *DiRuggiero* carefully spelled out the distinction between making custody awards in the first

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(ftn. continued)
sound policy. Wright, Miller & Cooper, *supra*, § 3609, at 460-61.



instance and the resolution of interstate disputes over the validity of competing custody decrees:

> The contemporary purpose of the domestic -relations exception rests on functional considerations. An award in the first instance of divorce, alimony, child custody, visitation, or support requires the exercise of an informed discretion, discretion in which local institutions are expert and with which federal courts are unfamiliar. Such awards require continuing supervision over large numbers of cases, for which the federal courts are ill-equipped. Unlike local institutions, the federal courts are not supplemented by a professional social service staff. And on a more theoretical plane, the discretionary standards for an award of support, alimony, custody, or visitation are so amorphous and flexible that the federal courts could not predict with any confidence that their application of state law would duplicate the result that would be obtained at the state level.
>
> *These considerations are absent in interstate disputes over the validity of competing custody decrees. In that circumstance we are not asked to make an award of custody, visitation, or support in the first instance. Rather, the federal courts must ascertain which of two competing state custody awards is paramount under federal and state law.* As we held in *Flood v. Braaten*, this determination "requires only a preliminary inquiry into jurisdictionl facts." 727 F.2d at 310.

*DiRuggiero*, 743 F.2d at 1019-20 (emphasis added).

The majority's reliance upon *Bennett v. Bennett*, 682 F.2d 1039 (D.C. Cir. 1982) is misplaced. In *Bennett*, the court was presented with two narrow issues: whether a federal

court has jurisdiction to grant monetary or prospective injunctive relief in a tort action based upon a parental kidnapping. *Id.* at 1042-43. As to injunctive relief, the plaintiff sought an order "directing and enjoining the defendant from any interference with the custody rights of the plaintiff" over the children. *Id.* at 1041. The court examined the legislative history of the PKPA and found that Congress deliberately omitted the creation of a direct role for the federal courts in determining child custody. *Id.* at 1043-44 & n.6. Because a grant of prospective injunctive relief would have required an inquiry into the interests of the children — an inquiry precluded by the domestic relations exception to diversity jurisdiction — the court held that it lacked jurisdiction to issue such an order. *Id.* at 1042-44.

The *Bennett* court's conclusion that Congress did not intend to alter the domestic relations exception to diversity jurisdiction and to confer on federal courts the power to *determine* the custody of children has no bearing on or relationship to the *enforcement* of a valid state custody decree through the vehicles of declaratory relief and limited injunctive relief. *See Flood*, 727 F.2d at 312 n.27; *Bennett*, 682 F.2d at 1045 (Edwards, J., dissenting in part). I would conclude that a district court may exercise its jurisdiction under section 1738A to enforce compliance with the PKPA's provisions through declaratory relief and narrowly circumscribed injunctive relief.

I would REVERSE the judgement of the district court.



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**FILED**
APR 9 1984
Clerk, U.S. District Court
Central District of California
By /s/ Deputy

**ENTERED**
APR 10 1984
Clerk U.S. District Court
Central District of California
By /s/ Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**DAVID A. THOMPSON,**

*Plaintiff,*

*vs.*

**SUSAN A. THOMPSON, a/k/a/ SUSAN A. CLAY,**

*Defendant.*

CASE NO.
CV-83 5221 AAH (Gx)

ORDER OF DISMISSAL

The Motion of defendant, SUSAN A. THOMPSON, aka SUSAN A. CLAY, made pursuant to Rule 12 of the Federal Rules of Civil Procedure to dismiss the action against said defendant came on regularly for Hearing on March 19, 1984, before the Honorable A. Andrew Hauk, Judge of the United States District Court, Central District of California, and the Court having examined the papers and declarations submitted in support and in opposition to the Motion and having read the argument of counsel and being fully advised, the Court determined that this matter must be dismissed as to said defendant based upon the absence of subject matter jurisdiction and the absence of in personam jurisdiction over the defendant.

**ORDER**

IT IS THEREFORE ORDERED that this action be dismissed and it is dismissed as to defendant, SUSAN A. THOMPSON, aka, SUSAN A. CLAY.

DATED: /s/
A. Andrew Hauk, United States
District Court, Central District

# OPPOSITION

# BRIEF

Supreme Court, U.S.
FILED
JAN 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-964

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

DAVID A. THOMPSON,

*Petitioner,*

versus

SUSAN A. THOMPSON, aka, SUSAN A. CLAY,

*Respondent.*

**On Petition for Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

1.

Does the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. §1738A (1982) create a private cause of action and jurisdiction in a federal district court as a forum of first resort to determine which of two states entering conflicting custody decrees should have jurisdiction over the child custody proceedings?

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| TEXTBOOKS: | |
| *13B Wright, Miller & Cooper Federal Practice and Procedure*, §3563 at 50 | 7 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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**No. 86-964**

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DAVID A. THOMPSON,

*Petitioner,*

versus

SUSAN A. THOMPSON, aka, SUSAN A. CLAY,

*Respondent.*

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**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

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## STATEMENT OF THE CASE

The following sequence of events provide the background for this proceeding. Most are reflected in Exhibit "A" to Motion to Dismiss and Reply Memorandum to Opposition to Motion to Dismiss filed in the United States District Court for the Central District of California in these proceedings:

1. On January 18, 1978, Susan filed a Petition for Dissolution of Marriage in the California court and for custody of their minor child, Matthew, born August 9, 1977.

2. In a series of hearings, Susan was granted sole custody.

3. On December 20, 1979, Susan and David were granted joint legal custody of Matthew, with physical custody remaining with Susan.

4. On November 17, 1980, Susan filed a Motion for Court Permission to move to the State of Louisiana in order to accept employment as head of the Child Neurology Division of Louisiana State University School of Medicine.

5. On December 4, 1980, after a hearing, the court entered the following judgment:

"Present order of custody remains in effect until petitioner moves to Louisiana; *then custody shall be soie with her without prejudice.*" (emphasis added)

The order also provides for visitation during the last week of each month by David and provides for transportation costs, phone calls, and other visitation matters.

6. Pursuant to the grant of the court's permission and its awarding her sole custody of Matthew, Susan moved to Louisiana on December 11, 1980 to accept her new employment.

7. On January 25, 1981, an incident occurred in the City of Shreveport, Louisiana, at the Greater Shreveport Regional Airport involving David and his son, Matthew, witnessed by a police officer.

8. The Juvenile Court of Caddo Parish, Louisiana, took protective custody of Matthew on



February 20, 1981. Matthew remains under of protective custody issued by that court.

9. On March 24, 1981, Susan filed in the First Judicial District Court of Caddo Parish, Louisiana a Petition for Filing and Enforcing of Foreign Custody Decree, for Judgment of Custody, and for Modification of Visitation Privileges.

10. David received proper notice of this proceeding; was represented therein by a court-appointed attorney, but made no personal appearance. The court was informed of the California proceedings pursuant to LSA-R.S. 13:1708. Testimony was adduced from Susan, a psychiatrist, a neurologist, and a police officer.

11. In this suit, Susan did not seek a *change* of the California custody order of December 4, 1980, but *its enforcement*, asking that it "be filed in the office of the Clerk of this Honorable Court under the provisions of LSA-R.S. 13:1714(A) [a portion of Louisiana's Uniform Enforcement of Custody Act, LSA-R.S. 13:1700 et seq], and that same be decreed to have the same effect and shall be enforced in like manner as the custody decree granted by this Honorable Court." The Louisiana court ordered that the December 4, 1980 California decree be filed pursuant to LSA-R.S. 13:1714(A) and ordered that "it be decreed to have the same effect and shall be enforced in like manner as a custody decree rendered by this Honorable Court."

12. The only modification of the December 4, 1980 California custody order sought by Susan and rendered in the Louisiana proceedings was the placing of temporary restrictions and conditions on David's visitation rights with Matthew, because of allegations and testimony of abuse of Matthew by David. Visitation was suspended for 3 months; restrictions were placed on visitation for the next 3 months and until modified by the Court, the Court retaining jurisdiction "to increase, decrease, terminate, otherwise modify the visitation privileges of the defendant (David) upon the application of either plaintiff (Susan) or defendant (David)." A judgment containing these provisions was rendered April 7, 1981.

13. David has never applied for any modification of these visitation privileges in the Louisiana court, but has relied upon the self-help described in Item 15 of Respondent's Statement of Facts and on page 11 in Applicant's Petition for Writ of Certiorari and upon his subsequent California decree.

14. On June 15, 1981, more than six (6) months after Susan and Matthew permanently left California and became residents of Louisiana on December 11, 1980, the California court granted sole custody to David, without visitation privileges to Susan except on approval of the court.

15. On September 13, 1981, David and an armed accomplice attempted unsuccessfully to kidnap Matthew from Susan's home in Shreve-



port. (the self-help involving "private investigators or even force and violence" endangering "not only the parents and innocent children but also innocent bystanders and responding law enforcement personnel" referred to by David on page 11 of his Petition for Writ of Certiorari)

16. On August 12, 1983, the present Complaint for Declaratory Relief and for Injunction Against Enforcement of Louisiana Order was filed by David.

17. In this Complaint, David seeks:

    a. A preliminary and a permanent injunction declaring that

        (1) the Louisiana judgment is invalid, and

        (2) the California order is valid and determines the custody as to the minor child, Matthew; and

        (3) until such time as California issues a permanent custody decree, that all custody disputes shall be determined by the appropriate court in the State of California.

David has never attempted to enforce the June 15, 1981 California judgment in a Louisiana Court, nor sought modification of the Louisiana decree of April 7, 1981.

## SUMMARY OF ARGUMENT

1. The Parental Kidnapping Prevention Act of 1980, 28 U.S.C. §1738A (1982) does not create

a private cause of action and jurisdiction in a federal district court *as a forum of first resort* to determine which of two states entering conflicting custody decrees should have jurisdiction over the child custody proceedings *when neither state has refused to enforce the judgment of the other state.*

2. There is no clear conflict between the federal courts of appeal on the narrow issue presented in the present case. The differences can fairly be accounted for on the basis of variations in the factual situations among the cases involved.

3. The present suit is not an appropriate one in which to grant certiorari to decide the issue presented. Other cases may resolve any conflict or more clearly frame the issue.

## ARGUMENT

1.

For over a hundred years prior to the enactment of 28 U.S.C. §1738A, the PKPA, this Court and federal courts of appeal had uniformly held that the full faith and credit clause of the federal Constitution, Article IV, §1, and its implementing statute, 28 U.S.C. §1738, did not provide an independent basis of jurisdiction in a federal court, but simply "prescribes a rule by which courts, Federal and state, are to guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a state other than that in which the court is sitting." *Minnesota v. Northern Securities Co.* 194



U.S. 48, 72, 24 S. Ct. 598, 605, 48 L. Ed. 87 (1904); *Wisconsin v. Pelican Insurance Co.*, 127 U.S. 265, 291-292, 8 S. Ct. 1370, 32 L. Ed. 239 (1888); *People of State of California ex rel McColgan v. Bruce*, 129 F.2d 421, 424 (9th Cir. 1942) cert. denied 317 U.S. 678, 63 S. Ct. 157, 87 L. Ed. 544; *Clifford v. Williams*, 131 F. 100, 105 (C.C.D. Wash. 1904); *Hazen Research, Inc. v. Omega Minerals, Inc.*, 497 F.2d 151, 153 (5th Cir. 1974); 13B Wright, Miller & Cooper, *Federal Practice and Procedure*, §3563 at 50. Were it otherwise, "any attempt, at any time or place, by any person, to enforce the provisions of any state statute or judgment would be, without more, a subject of federal jurisdiction," *People v. Bruce*, supra, 129 F.2d at 424.

The courts uniformly rejected these attempts to use 28 U.S.C. §1738 as the basis for jurisdiction in a federal court, as correctly noted in the majority Opinion below.

Congress was well aware of this long standing and consistent judicial interpretation when it enacted 28 U.S.C. §1738A. This statute also implements the full faith and credit clause of the federal constitution, but is restricted to a narrow class of actions, state court custody judgments. There should be clear and convincing evidence of Congressional intent before concluding that Congress intended to create a private right of action and jurisdiction in a federal court as a forum of first resort in this narrow class of cases, state custody decrees, while the same was denied, by 28 U.S.C. §1738, to the authenticated acts, records and judicial proceedings of all state and territorial courts in all other cases. Both §1738 and 1738A de-

rive from the full faith and credit clause, Article IV, Sec. 1 of the Constitution and implement that clause.

Such a Congressional intent cannot be found in the legislative history of 28 U.S.C. §1738A. On the contrary, Congress made a deliberate decision not to create such a private right of action and jurisdiction in its rejection of a legislative proposal to "amend Title 28 of the Code to grant jurisdiction to the federal courts to enforce state custody decrees" and in its rejection of the Fish bills, ably discussed in detail in the majority Opinion below. Opponent will not repeat that detailed and scholarly analysis of the legislative history of 28 U.S.C. §1738A, but urges it in this Brief in Opposition to Petition for Writ of Certiorari. It is clear from this review of the history of the PKPA that Congress did not create in that Act a private cause of action and jurisdiction in a federal district court as a forum of first resort to enforce a state custody judgment.

David argues that the lower court's ruling renders the PKPA nugatory, grants the states authority optionally to comply with the PKPA provisions, leaves affected parents with no lawful means of enforcing a state custody judgment, and relegates them to self-help. Not so. The present decision does not bar a litigant from a federal court review of his full faith and credit claim or other claim asserted under a federal statute, U.S. Constitution, or U.S. Treaty. This Court has reviewed and decided a number of full faith and credit cases involving divorce, custody, and support decrees. Among many others, see *Williams v. North Carolina*, 325 U.S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577 (1945); *Williams v. North Carolina* 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942); *New York*



*Ex. Rel. Halvey v. Halvey*, 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947); *May v. Anderson*, 345 U.S. 528, 73 S. Ct. 840, 97 L. Ed. 1221 (1952); *Kovacs v. Brewer*, 356 U.S. 604, 78 S. Ct. 963, 2 L. Ed. 2d 1008 (1958); *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 77 S. Ct. 1360, 1 L. Ed. 2d 1456 (1957), *Webb v. Webb*, 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981).

A recent instance, involving conflicting Louisiana and Texas custody judgments, is *Eicke v. Eicke*, 399 So. 2d 1231 (App. 1981), cert. denied La. 406 So. 2d 607, cert. granted, 456 U.S. 970, 102 S. Ct. 2232, 72 L. Ed. 843 (1982). The Court originally agreed to hear an appeal from a Louisiana decision refusing to enforce a Texas custody decree, on a claim that Louisiana was violating the Full Faith and Credit Clause by failing to recognize the Texas decree. After requesting briefs on the impact of 28 U.S.C. §1738A, the Court dismissed the writ of certiorari as improvidently granted, 459 U.S. 1139, 103 S. Ct. 776, 74 L. Ed. 2d 987 (1983).

The only requirement for a federal review of a full faith and credit claim under 28 U.S.C. §1738 is that the petitioner have specifically set up or urged the federal full faith and credit claim in the state courts. *Webb v. Webb*, cited supra. In *Webb*, a Florida judgment granted the mother custody. A Georgia judgment granted the father custody, which judgment was affirmed by the Georgia Supreme Court. Both Florida and Georgia had adopted the Uniform Child Custody Jurisdiction Act (UCCJA). This Court granted certiorari, based on the contention of the mother that Georgia had failed to give full faith and credit to the Florida decree. Upon examination of the record, the

Court found that the federal claim had not been asserted in the Georgia courts and dismissed the writ of certiorari for want of jurisdiction. It outlined the strong policy reasons supporting the rule: concerns for comity between federal and state judicial systems, the opportunity for state courts to perform their duty, opportunity for developing the record necessary for adjudicating the issue; the opportunity for state courts to construe state statutes so as to avoid or obviate federal constitutional challenges; the opportunity to determine if there are independent and adequate state grounds that would pretermit the federal issue, and if so, the opportunity for a state court to identify them and act upon them in an authoritative manner, all of which factors result in a reduction of the workload of the federal court system.

The lower court has noted the incomplete nature of the state court record in the present case and the resulting factual disputes, in footnotes 1 and 2 and the text footnoted 19.

Nor is there any basis for the view that Louisiana courts will not perform their constitutional duty in the present case and not comply with the Congressional mandate in 28 U.S.C. §1738A. In a number of cases, the Louisiana appellate courts have enforced foreign custody decrees or held that Louisiana lacked jurisdiction under the UCCJA or PKPA to modify them. See *DeLee v. Koss* (App. 1983) 430 So. 2d 196; *Gibson v. Gibson* (App. 1983) 429 So. 2d 877; *Byrum v. Hebert* (App. 1982) 425 So. 2d 322; *Schroth v. Schroth* (App. 1984) 449 So. 2d 640; *Wachter v. Wachter* (App. 1983) 439 So. 2d 1260, *Ingram v. Ingram* (App. 1985) 463 So. 2d 932, *Thomisee v. Pearson* (App. 1985) 465 So. 2d 259. In *DeLee v. Koss*, supra, the



Louisiana court held on non-federal grounds (the provisions of Louisiana's UCCJA), that Louisiana lacked jurisdiction to modify the visitation provisions of a Colorado judgment, although having jurisdiction to enforce the custody award itself.

David has not presented his full faith and credit claim asserted under Sec. 1738A to any state court for determination under the principles announced in *Webb* prior to seeking relief in a federal court. For all the policy considerations and reasons assigned in *Webb* and other cases, he should be required, as a minimum, to comply with these *Webb* prerequisites. He could have appeared in the Louisiana proceedings (of which he has timely and properly notified under the UCCJA) and urged his full faith and credit (PKPA) claim. A possible result would have been that his claim would have been sustained on state grounds (the Louisiana UCCJA), obviating any federal intervention, as occurred in *DeLee v. Koss*. If Louisiana had rejected his PKPA claim through a decision of its highest appellate court, he had adequate remedy for a federal review by writ of certiorari, 28 U.S.C. §1257 (1982), *Webb*, supra. Nor is he presently precluded from asserting his claim in a Louisiana state court. In addition, if Louisiana had no jurisdiction to enforce the California decree of December 4, 1980 and to modify its visitation provisions by temporarily curtailing David's visitation, an action would lie under Louisiana law for a nullity of that judgment for lack of subject matter jurisdiction, LSA-C.C.P. 2002(3). If the Louisiana court sustained his jurisdictional attack on the basis of local law, Louisiana's UCCJA, federal intervention would be obviated. *Webb*, supra. Additionally, the state proceedings would develop the fac-

tual record necessary for a federal adjudication of the claim, if that review became necessary. The state court might construe its own statute in such a way as to pretermit the federal issue. A litigant should not be permitted to by-pass the judicial procedures available in state courts in divorce, custody, and support cases in an attempt to invoke original jurisdiction in the federal court system, any more than he would be permitted to invoke its jurisdiction in a criminal case without exhausting his state remedies. *Carqueville v. Woodruff* (6th Cir. 1946) 153 F.2d 1011, at 1012.

2.

The issue of whether a plaintiff, prior to invoking the power of a federal court, must exhaust state judicial remedies for the alleged noncompliance with §1738A was not addressed in *Flood v. Braaten*, 727 F.2d 303 (3d Cir. 1984). See p. 312, ftn. 28.

In *Heartfield v. Heartfield*, 749 F.2d 1138 (5th Cir. 1984), the parties obtained conflicting state court visitation judgments, Sharon in Louisiana and Edward in Texas. Edward obtained in the federal district court in Texas injunctive relief prohibiting Sharon from continuing her litigation in the Louisiana state court (the same relief sought by David in this case under 28 U.S.C. §2283). The Court of Appeal reversed, noting "a true impasse situation has not occurred which would justify the exercise of jurisdiction directed against specific Louisiana court activity," p. 1143.

> A confrontation between the courts of Texas and Louisiana has not yet occurred. Until it does, the exercise of the power to enjoin Sharon Heartfield from pursuing her claim



in the Louisiana court is premature. There was a lack of jurisdiction to issue the preliminary injunction.

The federal court should not assume that a state court will make an improper decision by enjoining a movant from undertaking to get the court to do so. In the delicate and critical relationships which exist between the courts of different states, each of which obviously has jurisdiction over some aspects of the particular controversy, the federal court should not exercise its otherwise proper jurisdiction to enjoin a party to the dispute from undertaking to create a jurisdictional conflict which may never occur. The federal jurisdiction under PKPA, as we have outlined it above, does not require a vindication until the impasse between the state courts has actually been reached. (at p. 1143)

*Heartfield* correctly distinguished *Flood v. Braaten*, supra. In *Flood*, New York and North Dakota had issued conflicting custody decrees. Each had expressly refused to enforce the custody order of the other. The mother had been held in contempt at least three times and the father at least once. Each had been criminally charged for abducting their own children. The matter "had reached an impasse" and was at a "stalemate." (at p. 306). The Court concluded "that Congress rejected the idea that federal courts be called upon *in the first instance* to enforce a state court's child custody decree," (at p. 310, emphasis added). As earlier noted, the Court pretermitted the issue of "whether a plaintiff, prior to invoking the power of a federal court, must exhaust state judicial

remedies for the alleged noncompliance with Sec. 1738A." at p. 312, ftn. 28.

In *Hickey v. Baxter*, 800 F.2d 430 (4th Cir. 1986), prior to the institution of the proceedings in the federal district court in Virginia, a Florida state court had refused to recognize a conflicting Virginia state court custody award.

*Di Ruggiero v. Rodgers*, 743 F.2d 1009 (3d Cir. 1984) and *McDougald v. Jenson*, 786 F.2d 1465 (11th Cir. 1986) did not involve the narrow issue presented in this case, but presented federal question jurisdiction issues under 28 U.S.C. §1331 in actions for damages.

The final case relied upon by applicant, *Wasserman v. Wasserman*, 671 F.2d 832 (4th Cir. 1982), was a diversity action for damages for child enticement and did not involve conflicting state court custody awards or any full faith and credit issues.

An analysis of the cases reveals that there is no clear conflict between the federal courts of appeal on the narrow issue presented in this case, i.e., whether the PKPA created a private cause of action and jurisdiction in a federal district court as a forum of first resort, when neither state rendering conflicting custody awards has refused to enforce the judgment of the other.

Consideration of comity, the maintenance of the delicate balance between federal and state judicial systems, and the proper function of each in child custody cases are important to the resolution of the present jurisdiction issue. These considerations mandate that, before resorting to a federal court, David must at least attempt to enforce his judgment in the Louisiana



court in order to determine whether or not Louisiana will grant it full faith and credit. If it does, he will never have to urge his full faith and credit issue in a federal court. If it does not, he has full recourse for a federal review of his claim.

3.

In addition to the lack of a confrontation between the courts of California and Louisiana, the lack of an impasse situation, the lack of exhaustion of state remedies, the possibility that the issue may be resolved by state courts on non-federal grounds, the particular stance of this case mitigates against the granting of certiorari.

As noted, Louisiana recognized the California decree of December 4, 1980, but temporarily curtailed appellant's visitation privileges, invoking jurisdiction under LSA-R.S. 13:1702A(3)(ii), a provision of the UCCJA corresponding to California *Civil Code* Sec. 5152(1)(c)(ii). Both of these sections confer jurisdiction on a state to make a child custody determination if the child is physically present in a state and it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent. 28 U.S.C. §1738A(c)(2)(C)(ii) is an identical provision, thus recognizing this same jurisdictional basis for a state court to make a custody determination. Under Sec. 1738A, if:

> State A meets the jurisdictional criteria for a "home State," set forth in Section 1738(c)(2)(A), and State B meets those of physical presence of the child coupled with necessity for his protection in an emergency

> resulting from his mistreatment, stated in Section 1738A(c)(2)(C)(ii), . . . both States have subject matter jurisdiction consistently with the criteria in Section 1738(c) . . . the case involves concurrent jurisdiction on the parts of two States consistently with Section 1738A(c).

*Joint Hearings on the Parental Kidnapping Act of 1979 Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary and the Subcommittee on Child and Human Development of the Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 8 (1980), testimony of Russell M. Coombs, Professor of Law, Rutgers University.

This concurrent jurisdiction present in the case at bar was recognized in *Heartfield v. Heartfield*, supra, at 1143.

In order for a federal district court to determine if Louisiana (State B in Professor Coombs' illustration) had properly exercised its jurisdiction, it would have to hear evidence and determine if the allegations of mistreatment of Matthew by David set out in Articles 10-22 of Respondent's petition filed March 24, 1981, and upon which an extended hearing was held, were in fact true. This *would* require the federal district court to become "enmeshed in the underlying custody dispute," *Flood*, supra, at p. 310. and compel it to render a decision on the *underlying custody issue*. In this case, the court could not limit itself to a "preliminary inquiry into jurisdictional facts," *Flood*, supra, at p. 310, because the facts determining the granting of jurisdiction are the same facts deciding the underlying dispute concerning the welfare and custody of Matthew.



## CONCLUSION

The Petition for Writ of Certiorari should be DENIED.

Respectfully submitted,

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# APPENDIX

## APPENDIX

LSA-R.S. 13:1702A(3)

§1702. Jurisdiction

A. A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

* * * *

3. The child is physically present in this state and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

LSA-R.S. 13:1714A:

§1714. Filing and enforcement of custody decree of another state

A. A certified copy of a custody decree of another state may be filed in the office of the clerk of any district court or family court of this state. The clerk shall treat the decree in the same manner as a custody decree of the district court or family court of this state. A custody decree so filed has the same effect and shall be enforced in like manner as a custody decree rendered by a court of this state.

LSA-C.C.P. 2002

Art. 2002. Annulment for vices of form; time for action

A final judgment shall be annulled if it is rendered:

* * * *

(3) By a court which does not have jurisdiction over the subject matter of the suit.

Except as otherwise provided in Article 2003, an action to annul a judgment on these grounds may be brought at any time.

# AMICUS CURIAE

# BRIEF

No. 86-964

Supreme Court, U.S.
FILED
JAN 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

DAVID A. THOMPSON,

Petitioner,

v.

SUSAN A. THOMPSON, aka SUSAN A. CLAY,

Respondent.

---

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

# BRIEF FOR THE PEOPLE OF THE STATES OF CALIFORNIA, HAWAII, NEVADA, AND TEXAS, THE APPELLATE COMMITTEE OF THE CALIFORNIA FAMILY SUPPORT COUNCIL AND THE APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEY'S ASSOCIATION AS AMICI CURIAE

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## QUESTION PRESENTED

Whether, contrary to the view of four United States Courts of Appeals, the majority opinion of the Court of Appeals for the Ninth Circuit correctly concluded that the Parental Kidnapping Prevention Act (28 U.S.C. § 1738A) denies federal courts jurisdiction to determine whether a state has violated its provisions by failing to accord full faith and credit to a sister state's child custody decree, thereby establishing an incentive for parental kidnapping.

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No. 86-964

IN THE SUPREME COURT OF

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DAVID A. THOMPSON,

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ON WRIT OF CERTIORARI TO THE
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## INTEREST OF AMICI CURIAE

This case presents a significant issue regarding the continued viability of the Parental Kidnapping Prevention Act. In direct conflict with the Third, Fourth, Fifth and Eleventh Circuit Courts of Appeals, the Ninth Circuit has eschewed enforcement of the federal duty imposed upon the states under the standards set forth in PKPA to give full faith and

credit to the child custody decrees of sister states. The lower court's decision emasculates the statute, frustrates its purpose and restores the pre-PKPA motivation to snatch a child in violation of one state's custody order to seek a contrary order in a second state.

The People of the states of California, Hawaii, Nevada and Texas have a compelling interest in protecting the efficacy of child custody decrees issued by their state courts; in the enforcement of a sister state's federal duty to accord these decrees full faith and credit; and in the deterrent effect of such enforcement on parental kidnapping within their borders.



## REASONS FOR GRANTING THE WRIT

Congress intended to deter interstate parental abductions by requiring states to give full faith and credit to the custody decrees of sister states in accordance with federal standards set forth in the Parental Kidnapping Abduction Act [hereinafter referred to as PKPA or Section 1738A]. Thus, if State A issued a custody order in conformance with PKPA standards, State B must give State A's order full faith and credit and is prohibited from issuing a conflicting custody decree.

If the Ninth Circuit's majority decision is allowed to stand, State B could deny full faith and credit to State A's order with impunity and issue a second, conflicting decree. Such result would frustrate the Congressional intent to discourage continuing interstate custody disputes and deter abductions undertaken to obtain more favorable custody and

visitation awards; encourages parents to resort to self-help; and leaves the law in a state of confusion.

## I. THIS COURT SHOULD RESOLVE A DIRECT CONFLICT BETWEEN THE COURTS OF APPEALS AS TO WHETHER FEDERAL COURTS HAVE JURISDICTION TO ENFORCE COMPLIANCE WITH THE MANDATORY FULL FAITH AND CREDIT PROVISIONS OF PKPA.

PKPA imposes a mandatory federal duty upon the states to give full faith and credit to sister state child custody decrees. This case poses the significant question of whether there will be an effective means of enforcing that duty.

The Third, Fourth, Fifth and Eleventh Circuit Courts of Appeal have held that when a state court violates section 1738A, an action to enforce compliance with PKPA may be maintained in federal district court. Hickey v. Baxter, 800 F.2d 430 (4th Cir. 1986); McDougald v. Jensen, 786 F.2d 1465 (11th Cir. 1986); Heartfield v. Heartfield, 749 F.2d 1138 (5th Cir 1985);



Flood v. Braaten, 727 F.2d 303 (3d Cir. 1984); DiRuggierio v. Rodgers, 743 F.2d 1009 (3d Cir. 1984).

The Court of Appeals for the District of Columbia and the Court of Appeals for the Seventh Circuit have held that the "domestic relations exception" precludes federal injunctive relief in a child snatching tort action. Bennett v. Bennett, 682 F.2d 1039 (D.C. Cir. 1982); Lloyd v. Loeffler, 694 F.2d 489 (7th Cir. 1982). Bennett and Lloyd were based solely upon diversity jurisdiction; federal question jurisdiction was not alleged. The terms of PKPA were not analyzed in either opinion. The Ninth Circuit's majority opinion stands alone in denying federal enforcement of this important statutory right.

The conflict among the lower courts has left the law in confusion. This Court should accept review, correct the majority's erroneous interpretation of the law in this case, and restore uniformity

among the Courts of Appeals.

## II. THE COURT OF APPEALS MAJORITY OPINION FRUSTRATES CONGRESSIONAL INTENT, LEAVES VICTIMS WITH NO EFFECTIVE ENFORCEMENT MECHANISM AND REMOVES AN IMPORTANT DETERRENT TO PARENTAL KIDNAPPING.

### The Victims

In enacting PKPA, Congress was cognizant of the rapidly increasing incidence of parental kidnapping. At that time it was estimated that between 25,000 and 100,000 children were the victims of interstate abduction each year. Parental Kidnapping Prevention Act of 1978: Joint Hearing on S. 105 Before the Subcomm. on Criminal Justice of the Sen. Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Sen. Comm. on Labor and Human Resources, 96th Cong. 2d Sess. 48 (1980) [hereinafter PKPA Hearing] (statement of Senator Alan Cranston, p. 3). A post-enactment study based upon



telephone interviews conducted by Lou Harris and Associates projected an estimated 459,000 to 751,000 incidents of child snatching each year. Gelles, Parental Child Snatching: A Preliminary Estimate of the National Incidence, 46 Journal of Marriage and the Family 735 (1984). Only ten percent of snatched children are ever found. PKPA Hearing (statement of Senator Alan Cranston, p. 3).

As shocking as these numbers may be, the quantitative aspect of the problem barely suggests the extent of the emotional harm suffered by both parents and children when a child is taken.

In a recent study of 18 children kidnapped by their parents, 16 were found to have suffered from one or more of the following functional changes: (1) severe fright or psychic trauma, (2) mental indoctrination, (3) grief or rage about parental abandonment, (4) rejection of the offending parent, and (5) exaggerated

identification with or wish fulfillment about a parent.

"The stolen child has been deprived of personal control, lied to, and forced to grieve for an absent parent. Psychotherapy is probably indicated in almost every case, and psychiatric evaluation in all." Terr, Child Snatching: A New Epidemic of An Ancient Malady, 103 J. Pediatrics 151 (1983).

The despair of the victimized parent should not be ignored. Symptoms include severe depression, rage at the perpetrating spouse, a sense of helplessness, a paralysis in one's life and inability to cope, and frustration at courts and law enforcement agencies. Michael Agopian, PARENTAL CHILD STEALING (1981).

Lack of Enforcement Alternatives

Through PKPA, Congress sought to discourage continuing interstate child



custody disputes, deter parental kidnappingand bring finality to custody determinations by establishing mandatory full faith and credit provisions. The majority opinion delays and possibly prevents a final custody determination where two states issue conflicting custody decrees in violation of PKPA.

There is no basis for the court's speculative conclusion that states will rarely defy PKPA's mandatory full faith and credit provisions. The majority conveniently ignore the incentive to defiance created by their own decision. The message is clear: absent effective federal enforcement, states may violate their full faith and credit obligations with impunity.

The Court of Appeals majority intimate that this Court rather than a federal district court is the appropriate arbiter of alleged PKPA violations. The suggestion is thoroughly impracticable.

> [W]e are not persuaded that the Supreme Court now has the resources effectively to ensure compliance with § 1738A. Since there are scores of interstate custody disputes each year, limiting litigants to direct appeals to the United States Supreme Court would, for all practical purposes, deny them a forum to remedy transgressions of § 1738A. Flood v. Braaten, 727 F.2d at 312.

Even if this Court should exercise its discretionary jurisdiction under 28 U.S.C. section 1257 (1982), the extensive state court litigation preceeding such review would unduly prolong and increase the suffering of the victims and drain financial resources far better spent on child support. "The resolution of these interstate disputes is therefore a core function of the diversity jurisdiction of the lower federal courts." DiRuggiero v. Rodgers, 743 F.2d at 1020.

The longer custody remains unresolved, the greater the psychological damage to the victims. PKPA Hearing, (statement of Dr. Minkoff, p. 110). The parent's



frustration with "the system" increases and self-help becomes an increasingly attractive alternative.

> In this confused legal situation the person who has possession of the child has an enormous tactical advantage. Physical presence of the child opens the doors of many courts to the petitions and often assures him of a decision in his favor. It is not surprising then that custody claimants tend to take the law into their own hands, that they resort to self-help in the form of child stealing, kidnapping, or various other schemes to gain possession of the child. The irony is that persons who are good, law-abiding citizens are often driven into these tactics against their inclinations; and that lawyers who are reluctant to advise the use of maneuver of doubtful legality may place their clients at a decided disadvantage.

UNIF. CHILD CUSTODY JURISDICTION ACT, Prefatory Note, reprinted at 126 Cong. Rec. 22810 (1980).

PKPA as a Deterrent

Federal enforcement of PKPA is implicit in its purpose of deterring interstate abductions by facilitating the enforcement of sister state custody

decrees. Congressional Findings and Declaration of Purposes for Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7(a) reprinted in note following 28 U.S.C. section 1738A. Although PKPA does not expressly authorize a federal cause of action, Congress found that federal intervention was needed precisely because state courts had failed to give full faith and credit to the custody decrees of sister states. Ibid. PKPA's legislative history is replete with references to the need for federal intervention in the resolution of interstate problems which states acting independently could or would not resolve. See PKPA Hearing, (statement of Senator Alan Cranston, p. 4); at 7 (statement of Senator Malcolm Wallop, p. 7); at 20 (statement of Representative Robert Duncan, p. 20).

In stark contrast to the lower court's majority four other Courts of Appeal, the



Department of Justice, and other notable commentators have recognized the significant distinction between the creation of a federal forum to determine the custody of children in the first instance, and the delineation of enforceable federal standards to determine which state court may exercise its jurisdiction over a child custody dispute under PKPA. See PKPA Hearing (statement of Prof. Russell Coombs, p. 146); Addendum to PKPA Hearing (letter from Assistant Attorney General Patricia Wald to Rep. Peter Rodino, p. 102).

By mandating full faith and credit, Congress removed the incentive for a parent to abduct his child and cross state lines for a more favorable custody decision. Congress must have intended a federal forum to enforce noncompliance with the federal obligation to accord full faith and credit; a contrary construction makes compliance with PKPA's provisions optional, a result

clearly contrary both to the express language of the statute and its stated legislative purposes. Denial of a federal forum for resolution of alleged PKPA violations approaches "a judicial repeal of those statutory rights. 'To take away all remedy for the enforcement of a right is to take away the right itself' [citation omitted]." Flood v. Braaten, 727 F.2d at 312.

The lower court's decision allows a state to violate PKPA with impunity by issuing a custody decree in direct conflict with a prior custody determination by a sister state. The decision thereby frustrates Congressional intent and removes an effective deterrent to parental abduction. This Court should accept jurisdiction to correct the lower court's erroneous interpretation and give the issue the kind of treatment and resolution the victims and the country need and deserve.



## CONCLUSION

The decision below, on an issue of critical national importance, directly conflicts with significantly indistinguishable decisions in the Third, Fourth, Fifth and Eleventh Circuit Courts of Appeal; frustrates Congressional intent to deter interstate parental kidnapping and relegates the federal obligation to accord full faith and credit to sister states' child custody decrees to "barren rhetoric". Thompson v. Thompson, 798 F.2d 1547, 1560 (9th Cir. 1986). Absent correction by this Court, child abductors will be encouraged once more to kidnap their children and cross state lines in search of more

favorable custody determinations. The petition for writ of certiorari should be granted.

DATED: January 2, 1987

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General of California

STEVE WHITE
Chief Assistant Attorney General

RONALD E. NIVER, Supervising
Deputy Attorney General

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Deputy Attorney General

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Counsel for Amici Curiae

JB:kgw

# JOINT

# APPENDIX

Supreme Court, U.S.
FILED
MAR 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-964

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

---

**DAVID A. THOMPSON,**

*Petitioner,*

*vs.*

**SUSAN A. THOMPSON, aka, SUSAN A. CLAY,**

*Respondent.*

---

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

## JOINT APPENDIX

---

**LOVE, RIGBY, DEHAN, LOVE & McDANIEL**
**By: KENNETH RIGBY***
600 Johnson Bldg.
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(318) 226-1880
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*Attorney for Petitioner*
*Counsel of Record

PETITION FOR CERTIORARI FILED DECEMBER 8, 1986
CERTIORARI GRANTED JANUARY 27, 1987

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| DATE | PROCEEDINGS |
|---|---|
| 7/18/78 | SUSAN A. THOMPSON FILES PETITION FOR DISSOLUTION OF MARRIAGE IN LOS ANGELES SUPERIOR COURT |
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| 9/18/79 | TRIAL ON CUSTODY ISSUE, LOS ANGELES SUPERIOR COURT |
| 10/10/79 | TRIAL ON CUSTODY ISSUE CONTINUED |
| 12/19/79 | BIFURCATED HEARING AS TO STATUS |
| 12/4/80 | HEARING ON ORDER TO SHOW CAUSE FOR MODIFICATION OF VISITATION |
| 2/20/81 | MOTION FILED IN JUVIENILE COURT OF CADDO PARISH, LOUISIANA, CASE NO. 30080 |
| 2/20/81 | ORDER OF JUVENILE COURT ENTERED |
| 2/23/81 | ORDER OF JUVENILE COURT ENTERED |
| 3/24/81 | MOTION FILED, ORDER OF JUVENILE COURT ENTERED |

| | |
|---|---|
| 3/24/81 | PETITION FOR FILING AND ENFORCING OF FOREIGN CUSTODY DECREE FOR JUDGMENT OF CUSTODY AND FOR MODIFICATION OF VISITATION PRIVILEGES FILED IN FIRST JUDICIAL DISTRICT COURT OF CADDO PARISH, LOUISIANA; CASE NO. 277655 |
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| 4/7/81 | JUDGMENT RENDERED ON CASE NO. 277655, CADDO PARISH, LOUISIANA |
| 4/9/81 | FORAN INVESTIGATION REPORT FILED WITH LOS ANGELES SUPERIOR COURT |
| 6/15/81 | HEARING ON ORDER TO SHOW CAUSE FOR MODIFICATION OF CUSTODY, LOS ANGELES SUPERIOR COURT |
| 7/9/81 | SUSAN A. THOMPSON FILES NOTICE OF APPEAL OF JUNE 15, 1981 ORDER CHANGING CUSTODY. NOTICE FILED IN THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, CASE NO. 2d CIVIL NO. B009198 |
| 7/14/81 | ORDER AND MODIFICATION OF CHILD CUSTODY, LOS ANGELES SUPERIOR COURT |



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| 8/12/83 | DAVID A. THOMPSON FILES COMPLAINT, U.S. DISTRICT COURT FOR CENTRAL DISTRICT OF CALIFORNIA, CASE NO. 83-5221 AAH(Gx) |
| 1/24/84 | SUSAN A. THOMPSON FILES NOTICE OF MOTION TO DISMISS COMPLAINT |
| 2/27/84 | OPPOSITION TO MOTION TO DISMISS COMPLAINT FILED |
| 3/12/84 | REPLY TO OPPOSITION FILED |
| 3/19/84 | HEARING ON MOTION TO DISMISS |
| 4/10/84 | ORDER OF DISMISSAL ENTERED |
| 5/3/84 | NOTICE OF APPEAL FROM DISMISSAL FILED |
| 9/5/84 | APPELLANTS OPENING BRIEF FILED, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, CASE NO 84-5890 |
| 10/26/84 | APPELLEE'S BRIEF FILED |
| 11/20/84 | APPELLANT'S REPLY BRIEF FILED |
| 3/25/85 | SUSAN A. THOMPSON FILES PETITION FOR WRIT OF MANDATE IN THE SUPREME COURT OF THE STATE OF CALIFORNIA |

| | |
|---|---|
| 7/8/85 | NOTICE OF ABANDONMENT AND DISMISSAL OF APPEAL FILED IN COURT OF APPEAL, 2d CIVIL NO. B009198 |
| 12/19/85 | BRIEF OF AMICUS CURIAE FILED FOR THE UNITED STATES PURSUANT TO ORDER OF NINTH CIRCUIT COURT |
| 1/21/86 | APPELLANT'S REPLY TO AMICUS CURIAE BRIEF FILED |
| 9/10/86 | OPINION OF NINTH CIRCUIT COURT FILED |
| 12/8/86 | PETITION FOR WRIT OF CERTIORARI FILED IN THE UNITED STATES SUPREME COURT, CASE NO. 86-964 |
| 1/7/86 | AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI FILED |
| 1/8/87 | OPPOSITION TO PETITION FILED |
| 1/27/87 | CERTIORARI GRANTED |



SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 7
HON. HARRY T. SHAFER, JUDGE

In re the Marriage of
Petitioner: SUSAN A. THOMPSON
and
Respondent: DAVID A. THOMPSON

No. D964318

REPORTER'S PARTIAL TRANSCRIPT
December 4, 1980

APPEARANCES:

For the Petitioner: JOSEPH TABACK

For the Respondent: STUART W. KNIGHT

MURIEL B. SEYMOUR, CSR #34

Official Court Reporter

(Commencing on page three)

* * * *

THE COURT: Here is what I propose to do. I propose to have physical possession — I propose that the present order remain in effect until Mrs. Thompson leaves for Louisiana. She is to notify him when she has set up residence in Louisiana, notify him of all changes of residence within 48 hours after same has come to her attention.

Mr. Thomspon (*sic*) is likewise to do that with her. That Christmas, for the first week of Christmas up to and including 2:00 p.m. Christmas day —

THE PETITIONER: Your Honor, he had Christmas last year.

THE RESPONDENT: I did not.

THE COURT: Up to and including 2:00 p.m. Christmas day goes to him. 2:00 p.m. Christmas day. 2:00 p.m. Christmas day to 2:00 p.m. New Years day goes to her. And we continue under the present order until she leaves for Louisiana.

Once she leaves for Louisiana, custody is no more joint. Physical possession and custody goes to her, without prejudice. Because when it comes to medical, school, and religion, I don't want any impeding. If there is a major medical problem, she is to let him know what it is. With relation to school and religion, and ordinary medical case, she doesn't have to consult him.

This lasts until we get an investigator's report. Thursday before Easter, April 16, 8:30. I will have the report. I will have read the other reports. And I will make a decision so far as — on the custody, based not only on the reports, but also on what the court intends to do. I am not bound by the report.

MR. TABACK: Excuse me, Your Honor. There is no custody issue before the court.



THE COURT: I just want to get a review.

MR. KNIGHT: Your Honor, we intend to refile. It was only because —

THE COURT: All right, refile it. I will consider it. But I will say this. It's going to take a lot for me to change custody.

MR. TABACK: How will they do an investigation if she's in Louisiana?

THE COURT: Very easy. They have comparable representatives there. They know how to handle that.

That the present support order remain in effect, but that all transportation costs for transporting the child one week a month to the physical possession of Dr. David Thompson shall be split. Now, the court says that cost will be on this basis: two adult round trips and one round trip for the child.

The weeks will be as follows: the last week of each month, commencing the last week of the month after she has left. In other words, if you leave in January, he gets the last week in January, but let's define it. What did you suggest, Mr. Taback?

MR. TABACK: Sunday through Saturday.

THE COURT: That sounds all right. Sunday what time?

MR. TABACK: I guess that part, Your Honor, will be dictated by the airline schedule.

THE COURT: But in any event, they are to keep in touch with one another as to the specific airline schedule, so that when Dr. Thompson, Dr. David Thompson sends somebody to pick up the child, if he doesn't go, or if he does go, it's got to be an adult, responsible party, whoever goes there, will pick up the child at that particular time, and have coordinated the schedule to come back so that it's done the most effective way.

MR. TABACK: I think if Your Honor says that the child be picked up on Sunday of the week of visitation and

delivered in Shreveport, Louisiana on the following Saturday, that's fine.

MR. KNIGHT: Your Honor, wouldn't that be the following Sunday? We have a day of travel.

THE COURT: Pick up Sunday and Saturday. That's good enougn (*sic*). Let's not argue about that. All right.

MR. KNIGHT: Excuse me, Your Honor.

THE COURT: Let's not argue.

MR. KNIGHT: I am not arguing. Could we have an order that if for any reason Dr. Chay —

THE COURT: See why these people never make it?

MR. KNIGHT: It's been tough so far, Your Honor. — that she will notify him at least 48 hours in advance?

THE COURT: If what?

MR. KNIGHT: If there is a problem with the child being sick and can't make it, that kind of —

THE COURT: Yes, if the child for some reason is not going to make it, she is to notify him at least 72 hours in advance. Also —

MR. KNIGHT: Then it will be the next week, I assume.

THE COURT: Then it's got to be made up within the next two weeks.

That each party is permitted one telephone call a week, 7:00 o'clock. If the child is in Louisiana, then it's 7:00 o'clock Louisiana time. If the child is in California, 7:00 o'clock California time., on Wednesdays of each week. In other words, on the week you have the child, he gets a call 7:00 o'clock. Have the phone unengaged. And she talks to the child. When she's got the child, every Wednesday 7:00 o'clock California time, you have the phone unengaged, and he talks to the child.

Cost of the investigation will be allocated by the court at the next hearing. Fill out the forms for the investigator.



Neither party to make any remarks to the child or to anyone else which will be construed as being derogatory about the other, in a manner which may be conveyed to the child. I think that takes care of it. Anything else? Who is going to prepare the order?

MR. TABACK: I will, Your Honor.

THE COURT: While the order is effective when pronounced, which is today, Mr. Taback, if you will have the order by the 10th of January, and back here by the 17th of January. If there is any dispute, take it up with me by the 17th. If you want more time, I will give you more time.

If there is anything that comes up between counsel, before you make formal motions you must come in to see me informally, on 48-hour notice to the other party. No ex parte situations. Both come in and say, "This is what happened. Dr. Thompson tells me this, Dr. Thompson tells me this." I will try to resolve it. If you can't do it, it may require a formal motion. You understand? Until that time, don't come in with a flurry of papers, just come in, both of you, and we will discuss it, any morning from 7:00 o'clock until 8:30, that's when I hold these conferences, and we will discuss the matter.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

DATE: DEC 04 1980 DEPT. 2
HONORABLE B G MILLS JUDGE
HONORABLE HARRY T SHAFER JUDGE PRO TEM
J CARRILLO, N. STEVENS DEPUTY SHERIFF
E SCHWARTZ DEPUTY CLERK
A MISKO
C KNAPP, M SEYMOUR REPORTER
(Parties and Counsel checked if present)

---

8:30AM D964318
In RE the marriage of
THOMPSON, SUSAN A-ETC √ Petitioner
and
THOMPSON, DAVID A √ Respondent

Counsel for Petitioner JOSEPH TABACK √
Counsel for Respondent R W WEISS
STUART KNIGHT √

NO FILE

---

NATURE OF PROCEEDINGS: [x]Petitioner [ ]Respondent
OSC IN re: MODIFICATION OF:

[x] ORDER OF 12/20/79 Respondent's motion to continue is denied in Dept 2

[ ] INTERLOCUTORY JUDGMENT entered on _____ in Book_____, page_____

[ ] It is stipulated that Commissioner _____ may here *(sic)* this matter as a Judge Pro Tempore, and that he or any commissioner may hear any other proceeding subject to withdrawal.

[ ] Off calendar — no appearance/request of PETNR/ RESP/COURT

[x] Petitioner is sworn and testifies.

[x] Respondent is sworn and testifies.

[x] Stipulation is filed for appt of court investigator, costs to be allocated at next hearing on APRIL 16, 1981, 8 AM, DEPT 7

[ ] The matter is continued to ____ in Dept. ___ at ____

[ ] PETNR/RESP to give notice [ ] Notice waived

[ ] The order to show cause in re modification is denied.

[ ] The [ ] Order [ ] Interlocutory judgment is modified in the following respect: Present order of custody remains in effect until petitioner moves to Louisiana; then custody shall be solely with her without prejudice. She is to inform respondent of her change in address and phone within 48 hours; he is to do the same. Transportation costs for visitation (2 adult and 1 child round trip) shall be split and visitation shall be the last week each month after wife moves away. Phone call to child shall be every Wed 7 PM of the time for the state where the child is. Xmas 1980 with father to 2 PM Xmas Day; mother from 2 PM Xmas Day to 2 PM New Year's Day. Neither side is to make any derogatory remarks about the other or in such a way as to convey that in the child's presence. Petitioner's counsel to prepare atty order, submit to other side and then to Court by 1/17/81. Any dispute is to be resolved by informal conference before any formal papers are filed.

[ ] Petitioner/Respondent is ordered to pay to the custodial parent for the support and maintenance of the minor child(ren) the sum of $_____ per child, a total of $_____ payable at the rate of $_____ [ ] per week [ ] biweekly [ ] per month [ ] semi-monthly on the ____ of each _____, commencing _____



[ ] Petitioner/Respondent is ordered to pay to counsel for _____ as his/her contributive share of attorney fees the sum of $_____, plus costs of $_____, a total of $_____ payable $_____ per month of the _____ of each month commencing _____

[ ] The court makes its order pursuant to stipulation recited in open court this date as reflected in the notes of the court reporter. Counsel for _____ to prepare an order in accordance therewith to be approved by opposing counsel.

[ ] Parties referred to Conciliation Court.

[ ] Other

MINUTES ENTERED
DEC 04 1980
LA DEPT. 2
COUNTY CLERK

STATE OF LOUISIANA
IN THE INTEREST OF
MATTHEW ALLEN THOMPSON

JUVENILE COURT FOR
CADDO PARISH, LOUISIANA
CASE NUMER: 30080

## MOTION

NOW INTO COURT, comes the State of Louisiana, represented by the undersigned, who moves as follows:

1.

That on February 18, 1981, in Shreveport, Caddo Parish, Louisiana, Mrs. Susan Alice Clay made affidavit (attached hereto) setting forth the emotionally disturbed condition of her three and one-half year old child, Matthew Allen Thompson, and further setting forth events which have led up to and contributed to the current condition of the child.

2.

That on February 18, 1981, a letter (attached hereto) was received by this Court's staff from Dr. Paul D. Ware, a psychiatrist specializing in child psychiatry, confirming the emotionally disturbed condition of this child, Matthew Allen Thompson, setting forth that treatment for the child is essential and that visitation by the child's father, David A. Thompson, should be temporarily suspended pending treatment.

3.

That the next scheduled visitation with the child's father is scheduled for February 22, 1981.

4.

That the attached affidavit and letter set forth cause for the issuance of an instanter order, as provided in Louisiana Revised Statute 14:403, for the protection of this child from immediate and forthcoming emotional trauma and abuse, and to assure the continued treatment and care of this child's currently diagnosed mental health problems.

5.

That an instanter order, taking this child into custody, is the only means of protecting this child, pending a complete investigation into the alleged emotional abuse.

WHEREFORE, mover, for the protection of the child, Matthew Allen Thompson, prays that an instanter order issue taking said child, Matthew Allen Thompson, into custody, as provided in Louisiana Revised Statute 14:403.

/s/ Stephen M. Waller
Stephen M. Waller
ASSISTANT DISTRICT ATTORNEY

STATE OF LOUISIANA :
PARISH OF CADDO :

BEFORE ME, the undersigned authority, came and appeared Stephen M. Waller, who after being duly sworn on his oath, deposes and states:

That he is an Assistant District Attorney for Caddo Parish, Louisiana, and he has read the above and foregoing motion, and the allegations contained therein are true and correct to the best of knowledge, information and belief.

/s/ Stephen M. Waller
Stephen M. Waller
ASSISTANT DISTRICT ATTORNEY

THIS DONE AND SIGNED on this 20th day of February, 1981, in Shreveport, Caddo Parish, Louisiana.

/s/ W Emerson Eagan J.
NOTARY PUBLIC



## ORDER

Considering the above,

IT IS ORDERED that the child, Matthew Allen Thompson, be taken into protective custody of this Court, that physical placement of this child should be with his mother, Susan Alice Clay, pending further proceedings, and that the child be provided needed psychotherapy under the direction of Dr. Paul D. Ware.

IT IS FURTHER ORDERED that the child shall not be removed from the jurisdiction of this Court, pending further orders of this Court.

IT IS FURTHER ORDERED that a hearing to determine continued custody be held in accordance with Louisiana Revised Statute 14:403, and said hearing be set for the 23rd day of February, 1981, at 2 o'clock P.M.

THUS DONE AND SIGNED on this 20th day of February, 1981, in Shreveport, Caddo Parish, Louisiana.

/s/ Andrew B. Gallagher
JUDGE
JUVENILE COURT FOR CADDO PARISH

**JUVENILE COURT**

---

CADDO PARISH, LOUISIANA

---

**No. 30080**
**STATE OF LOUISIANA**
**In the interest of: Matthew Allen Thompson**

February 20, 1981 -----mp

MOTION filed. ORDER signed and filed ordering that the child, Matthew Allen Thompson, be taken into protective custody of this Court, that physical placement of this child should be with his mother, Susan Alice Clay, pending further proceedings, and that the child, be provided needed psychotherapy under the direction of Dr. Paul D. Ware.

It is further ordered that the child not be removed from the jurisdiction of this Court, pending further orders of this Court.

It is further ordered that a hearing to determine continued custody be held in accordance with Louisiana Revised Statute 14:403 and said hearing be set for the 23rd day of February, 1981 at 2:00 p.m., Section A.

February 23, 1981 -----cp

Case was called for hearing in Closed Court, Section A, Judge Gorman E. Taylor presiding, to determine continued custody.

Stephen Waller, Assistant District Attorney, present. Barbara Harris, Protective Service Worker, Attorney Kenneth Rigby present representing the mother of the said child, Susan Clay. Evidence adduced; hearing had.

For reasons orally assigned; It is ordered that Matthew Thomas be continued in the custody of the Department of Health and Human Resources, with physical placement with the mother, Susan Clay 8501 E. Wilderness Way, under the supervision of the Shreveport Child Protection Center.



STATE OF LOUISIANA
IN THE INTEREST OF
MATTHEW ALLEN THOMPSON

JUVENILE COURT FOR
CADDO PARISH, LOUISIANA
CASE NUMER: 30080

## MOTION

NOW INTO COURT, comes the State of Louisiana, represented herein by the undersigned, who moves as follows:

1.

That on February 23, 1981, the child was ordered into the protective custody of the State of Louisiana, pending an investigation by the Louisiana Department of Health and Human Resources, as required by Louisiana R.S. 14:403.

2.

That due to the following, mover is unable to file its petition within the thirty day period required by Louisiana R.S. 14:403, which time expires on March 25, 1981.

3.

That the father of this child is a resident of the State of California, and in order to complete the required investigation of this child, a study and report on the father, David A. Thompson, is essential.

4.

That since, February 23, 1981, efforts have been made to acquire the report and study on the father, which is being prepared by the State of California, Family Law Department, Child Custody Investigations.

5.

That information has been received from California that a final home study and interview will be conducted by the California authorities on March 26, 1981, and thereafter the matter will be finalized and the report forthcoming.

6.

That due to the necessity for this report and study on the child's father, and the State of Louisiana's good faith effort to complete its investigation, an extension of time is required for the filing of a petition, and all orders of this Court should remain in full force and effect until said extension expires or a petition is filed.

WHEREFORE, mover prays that the time for filing a petition in this matter be, for the cause above set forth, extended until April 24, 1981

/s/ Stephen M. Waller
Stephen M. Waller
ASSISTANT DISTRICT ATTORNEY

ORDER

Considering the above, with good cause having been shown,

IT IS ORDERED that the State of Louisiana Department of Health and Human Resources shall have until April 24, 1981, at 4:30 o'clock p.m., to file a petition in this matter; and further that all orders previously rendered in this matter shall be continued until the above date and time, pending filing of a petition as required by law.

THUS RENDERED, DONE AND SIGNED on this 24th dayof March, 1981, in Shreveport, Caddo Parish, Louisiana.

/s/ Gorman E. Taylor
JUDGE
CADDO PARISH JUVENILE COURT

FILED: JUVENILE COURT
Caddo Parish, La.
March 24, 1981
/s/ Margaret B. Phillips
Deputy Clerk



| | | |
|---|---|---|
| SUSAN ALICE CLAY | • | SUIT NUMBER 277655 |
| VERSUS | • | FIRST JUDICIAL DISTRICT COURT |
| DAVID A. THOMPSON | • | CADDO PARISH, LOUISIANA |

PETITION FOR FILING AND ENFORCING OF FOREIGN CUSTODY DECREE, FOR JUDGMENT OF CUSTODY, AND FOR MODIFICATION OF VISITATION PREVILEGES

The petition of SUSAN ALICE CLAY, a resident of the City of Shreveport, Caddo Parish, Louisiana, with respect shows:

1.

That she was formerly married to the defendant herein, DAVID A. THOMPSON, but was judicially divorced from him on January 25, 1980 in the Superior Court of California, County of Los Angeles.

2.

That the minor child, MATTHEW ALLEN THOMPSON, was born of plaintiff and defendant on August 9, 1977.

3.

That plaintiff was awarded the custody of the said child in the California court proceedings.

4.

That petitioner is a medical doctor, and secured a position on the teaching staff of the Louisiana State University School of Medicine in Shreveport, Louisiana.

5.

That, prior to moving from the State of California to Shreveport, Louisiana, petitioner sought and obtained permission of the California Court to remove the child from the State of California to the State of Louisiana and she was granted full custody of the said minor child, as appears more fully from the certified copy of the order or judgment dated December 4, 1980, attached to and made a part of this petition.

6.

That the said certified copy of the custody decree of the Superior Court of California, County of Los Angeles, in Docket Number D964318 entitled In Re The Marriage of Susan A. Thompson and David A. Thompson dated December 4, 1980, should be filed with the Clerk of the First Judicial District Court, Caddo Parish, Louisiana, under the provisions of LSA-R.S. 13:1714(A).

7.

Petitioner shows, that, under the provisions of LSA-R.S. 13:1714(A) the custody decree shall be treated in the same manner as a custody decree of this Honorable Court, and that the same shall have the same effect and shall be enforced in like manner as a custody decree rendered by this Honorable Court.

8.

That, as appears more fully from the said decree, the defendant was granted visitation with the said minor child the last week of each month after petitioner moved to the State of Louisiana.

9.

That petitioner moved to the State of Louisiana on or about December 12, 1980.

10.

That, because of the facts hereinafter alleged, and similar facts, and their effect upon the emotional and mental welfare of the said minor child, the visitation provisions of the said decree should be modified, so as to limit the visitation of the defendant with the said minor child to the State of Louisiana, on less frequent occasions, for shorter periods of time, under Court supervision, and under other such terms and conditions as the Court deems appropriate for the welfare and safety of the said minor child.



11.

The child has told plaintiff and others that he is afraid of his father and does not want to visit him because he "hurts him." The defendant has a long history of episodic violence and emotional abuse to the child, the following being non-exclusive examples of the same.

12.

In November, 1977, when the child was 3-1/2 months old, he was fussing at the table, the defendant picked the child up and locked him in a room at the far end of the house, saying "children should be seen and not heard."

13.

In March, 1978, plaintiff, the defendant, and the minor child were in an automobile approximately 30 miles from home when the child became fussy. The defendant slammed on his brakes and demanded that plaintiff and the said minor child get out on the freeway, which they were forced to do, and he left in the car, leaving them abandoned and stranded on the freeway. Plaintiff called her parents to come and pick them up and take them home.

14.

On October 9, 1978, while plaintiff was holding the minor child, the defendant physically battered her, he then grabbed the child out of her arms and sped away from her residence. He was found guilty of contempt of court, fined and placed on one year's probation. Criminal charges were brought by the District Attorney, but on the day of the trial plaintiff requested that the charges be dropped because of the child.

15.

During the period February to June, 1979, after the institution of overnight visitation by the defendant with the child, the child becamed *(sic)* progressively regressed. He lost all speech, rocked, lost motor milestones, withdrew and exhibited bizarre sexual activity, such as anal masturbation. James Apthrp, M. D., Head Child Abuse Team, Children's

Hospital of Los Angeles, California, stated that "Matthew was being significantly emotionally abused during visitation with his father." Justin Call, M. D., and Professor and Chief of Child and Adolescent Psychiatry at the University of California, Irvine, California, felt that Matthew was "suffering from chronic regression secondary to emotional abuse by his father."

16.

On November 23, 1979, an off duty California Highway Patrol Officer was performing surveillance on the defendant, to secure Matthew's safety, during a visitation. The defendant, with the child in the car, attempted to ram the vehicle driven by the officer and then attempted with his headlights off to push this officer's vehicle off the canyon road with his bumper just inches behind the officer's vehicle.

17.

In February, 1980, following the first weekend visitation with his father, Matthew, the child, developed an eye tic which persisted for several months.

18.

In July, 1980, and on multiple subsequent occasions the defendant, in the child's presence, threatened to not return the child some weekend. In addition, he has repeatedly frightened the child by screaming and threatening the plaintiff in the child's presence.

19.

On October 14, 1980, when plaintiff picked Matthew up at defendant's residence following a visitation, she found Matthew crying. Subsequent examination revealed that two hours previously his wrist had been fractured and his elbow dislocated during the visitation period, and that medical attention had not been sought for him by the defendant. Plaintiff alleges that the defendant on this occasion had become angry at Matthew and had grabbed him by one hand



and had shaken him back and forth until the boy began screaming from pain. Plaintiff took him to an orthopedist, who placed him in a long arm cast for six weeks.

20.

After plaintiff and the child moved to Shreveport, and in compliance with the visitation provision of the California decree, the defendant flew in from California to pick up Matthew for his weekly visitation. Matthew had been crying for two days, saying he didn't want to go to see his father, after plaintiff advised him that he was going to visit his father. At the Greater Shreveport Municipal Airport, where plaintiff took Matthew to meet his father, the defendant completely ignored him, did not even say hello or greet him, and Matthew began crying and screaming that he wouldn't go. He clung to the plaintiff with both arms and legs pleading "Moma no, please mama, no Mama no." Without a word, the defendant grabbed Matthew by one arm, pulling him out of plaintiff's arms and pulled him unto the plane with Matthew still screaming and pleading "Mama, no please Mama." Plaintiff could still hear Matthew screaming when the airplane doors closed. The defendant made no attempt to talk to the boy, console him, or speak to him in any manner, but simply grabbed him and carried him unto the plane. The police and airport security came running to determine the problem.

21.

When plaintiff picked up Matthew at the end of the visitation on January 31, 1981, Matthew was expressionless, totally nonverbal, did not respond to plaintiff either verbally or physically and exhibited constant genital masturbation. He did not talk for hours, and when he finally did he was hesitant and had a profound stutter. The masturbation continued for days before resolving, and some elements of the stuttering persisted. For several weeks after returning home, he refused to leave the house, frequently refusing to even go into the yard. He has had some periods of rapidly

alternating mood swings with sudden prolonged outburts of uncontrolled sobbing and crying and screaming out "Mama," and only within the last month has he not awaken from his nap crying Mama.

22.

Since the above incident and episode, the minor child has been under the treatment of Paul D. Ware, M. D., psychiatrist in the City of Shreveport, Louisiana, who has diagnosed the minor as suffering from a severe anxiety disorder of childhood with many borderline psychodic features, showing severe mood and behavioral fluctuations with very little external stimuli, demonstrating a severe regression and many psychotic manifestations. He is of the opinion that visitation with the father be at least temporarily suspended, as the boy expresses extreme fear of being separated from his mother, and even a greater fear of being with his father.

23.

That the defendant should be duly cited to appear and show cause, if any he can, why plaintiff should not be awarded the custody of the minor child, Matthew Allen Thompson, and why the visitation privileges of the defendant with the said minor child should not be restricted to the State of Louisiana, at such times and such places and under such conditions as the Court deems appropriate for the welfare and protection of the said minor child, and why the said minor child should not be taken by the defendant out of the jurisdiction of this Honorable Court.

24.

That a curator ad hoc should be appointed to represent the said defendant herein.

WHEREFORE, plaintiff, SUSAN ALICE CLAY, prays:

(a) That the said copy of the custody judgment dated December 4, 1980, of the Superior Court of California, County of Los Angeles, Docket Number D964318 entitled In Re The Marriage of Susan A. Thomspson and David A. Thompson, wherein plaintiff was awarded the sole custody of the minor child, Matthew Allen Thompson, be filed in the office of the Clerk of this Honorable Court under the provisions of LSA-R.S. 13:1714(A), and that same be decreed to have the same effect and shall be enforced in like manner as the custody decree granted by this Honorable Court.



(b) That the defendant, DAVID A. THOMPSON, be notified of the pendency of these proceedings as provided in LSA-R.S. 13:1704(A).

(c) That a curator ad hoc be appointed to present the absentee defendant herein, DAVID A. THOMPSON.

(d) That the defendant be duly cited to appear and show cause why plaintiff should not be awarded the custody of the minor child, Matthew Allen Thompson, and why the visitation privileges of the defendant with the said minor child should not be restricted to the State of Louisiana, at such times and places and under such terms and conditions as the Court may fix for the welfare and protection of the said minor child.

(e) For all costs of these proceedings.

LOVE, RIGBY, DEHAN, LOVE & McDANIEL
600 Johnson Building-P. O. Box 1835
Shreveport, Louisiana 71166

BY /s/ KENNETH RIGBY
KENNETH RIGBY-ATTORNEYS
FOR SUSAN ALICE CLAY

SERVE CURATOR AD HOC

STATE OF LOUISIANA

PARISH OF CADDO

BEFORE ME, the undersigned Notary Public, personally came and appeared SUSAN ALICE CLAY, who, after being duly sworn, did depose and state:

That she is the plaintiff in the above and foregoing petition; that she has read the same and that all of the allegations of fact contained therein are true and correct to the best of her information, knowledge and belief.

SWORN TO AND SUBSCRIBED before me, Notary Public, on this the 24th day of March, 1981.

/s/ SUSAN ALICE CLAY
SUSAN ALICE CLAY

/s/ KENNETH RIGBY
NOTARY PUBLIC



SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

DATE: DEC 04 1980 DEPT. 2
HONORABLE B G MILLS JUDGE
HONORABLE HARRY T SHAFER JUDGE PRO TEM
J CARRILLO, N. STEVENS DEPUTY SHERIFF
E SCHWARTZ DEPUTY CLERK
A MISKO
C KNAPP, M SEYMOUR REPORTER
(Parties and counsel checked if present)

---

8:30AM D964318
In RE the marriage of
THOMPSON, SUSAN A-ETC √ Petitioner
and
THOMPSON, DAVID A √ Respondent

Counsel for Petitioner JOSEPH TABACK √
Counsel for Respondent R W WEISS
STUART KNIGHT √

NO FILE

---

NATURE OF PROCEEDINGS: [x]Petitioner [ ]Respondent
OSC IN re: MODIFICATION OF:

[x] ORDER OF 12/20/79 Respondent's motion to continue is denied in Dept 2

[ ] INTERLOCUTORY JUDGMENT entered on _____in Book_____, page_____

[ ] It is stipulated that Commissioner _____ may here *(sic)* this matter as a Judge Pro Tempore, and that he or any commissioner may hear any other proceeding subject to withdrawal.

[ ] Off calendar — no appearance/request of PETNR/ RESP/COURT

[x] Petitioner is sworn and testifies.

[x] Respondent is sworn and testifies.

[x] Stipulation is filed for appt of court investigator, costs to be allocated at next hearing on APRIL 16, 1981, 8 AM, DEPT 7

[ ] The matter is continued to ___ in Dept. ____ at ____

[ ] PETNR/RESP to give notice [ ] Notice waived

[ ] The order to show cause in re modification is denied.

[ ] The [ ] Order [ ] Interlocutory judgment is modified in the following respect: Present order of custody remains in effect until petitioner moves to Louisiana; then custody shall be solely with her without prejudice. She is to inform respondent of her change in address and phone within 48 hours; he is to do the same. Transportation costs for visitation (2 adult and 1 child round trip) shall be split and visitation shall be the last week each month after wife moves away. Phone call to child shall be every Wed 7 PM of the time for the state where the child is. Xmas 1980 with father to 2 PM Xmas Day; mother from 2 PM Xmas Day to 2 PM New Year's Day. Neither side is to make any derogatory remarks about the other or in such a way as to convey that in the child's presence. Petitioner's counsel to prepare atty order, submit to other side and then to Court by 1/17/81. Any dispute is to be resolved by informal conference before any formal papers are filed.

[ ] Petitioner/Respondent is ordered to pay to the custodial parent for the support and maintenance of the minor child(ren) the sum of $_____ per child, a total of $_____ payable at the rate of $_____ [ ] per week [ ] biweekly [ ] per month [ ] semi-monthly on the _____ of each _____, commencing _____



[ ] Petitioner/Respondent is ordered to pay to counsel for _____ as his/her contributive share of attorney fees the sum of $_____, plus costs of $_____, a total of $_____ payable $_____ per month of the _____ of each month commencing _____

[ ] The court makes its order pursuant to stipulation recited in open court this date as reflected in the notes of the court reporter. Counsel for _____ to prepare an order in accordance therewith to be approved by opposing counsel.

[ ] Parties referred to Conciliation Court.

[ ] Other

MINUTES ENTERED
DEC 04 1980
LA DEPT. 2
COUNTY CLERK

| | | |
|---|---|---|
| SUSAN ALICE CLAY | • | SUIT NUMBER 277655 |
| VERSUS | • | FIRST JUDICIAL DISTRICT COURT |
| DAVID A. THOMPSON | • | CADDO PARISH, LOUISIANA |

AFFIDAVIT OF PLAINTIFF UNDER LSA-R.S. 13:1708

STATE OF LOUISIANA

PARISH OF CADDO

BEFORE ME, the undersigned authority, personally came and appeared SUSAN A. CLAY, who, after being duly sworn, did depose and state:

That, in compliance with LSA-R.S. 13:1708, she does give the following information:

(1) The present address of the child, Matthew Allen Thompson, is 8501 East Wilderness, Shreveport, Louisiana.

(2) The places where the child has lived within the last five years and the names and present addresses with whom the child has lived during that period are as follows:

| | |
|---|---|
| 811 Inverness Drive<br>Flintridge California | - David A. Thompson and<br>Susan Alice Clay |
| 894 Crest Vista Drive<br>Monterey Park, California. | - Susan Alice Clay |

(3) Affiant has participated as a party in suit number D964318 entitled Susan A. Thompson versus David A. Thompson, Superior Court of California, County of Los Angeles, being litigation concerning the custody of this child.

(4) That there is pending in the above numbered and entitled cause a petition by DAVID A. THOMPSON for custody of the said minor child, filed after the said minor child and plaintiff received permission from the California Court to move to Louisiana, and after they had so moved and established their domicile in the State of Louisiana.

SWORN TO AND SUBSCRIBED before me, Notary Public, at my office in the City of Shreveport, Caddo Parish, Louisiana, on this the 24th day of March, 1981.

/s/ SUSAN ALICE CLAY
SUSAN ALICE CLAY

/s/ KENNETH RIBGY
KENNETH RIGBY, Notary Public



## CITATION

(TITLE OMITTED IN PRINTING)

THE STATE OF LOUISIANA: TO
DAVID A. THOMPSON THRU
GARY L. FOX, CURATOR AD HOC
of the Parish of Caddo.

You are hereby cited to comply with the demand contained in the petition, a certified copy of which accompanies this citation or to file your answer or other pleading to said petition in the office of the Clerk of the First Judicial District Court in the Caddo Parish Court House in the city of Shreveport in said Parish within fifteen (15) days after the service hereof. Your failure to comply herewith will subject you to the penalty of entry of default judgment against you.

WITNESS the Honorable Judges of our said Court on this the 24th day of March, 1981.

/s/ M. Spence
Deputy Clerk

PLEASE MAKE RETURN THIS SIDE
PERSONAL SERVICE

RECEIVED the within Citation on the 25th day of March, 1981 and on the 25th day of March, 1981, served the same on the within named David A. Thompson in the Parish of Caddo, State of Louisiana, by handing a certified copy hereof, together with a certified copy of plaintiff's petition, to Gary L. Fox, Atty

FILED
MAR 26 1981
/s/ Carmen Clark
Deputy Clerk

/s/ C. Wilkinson
Deputy Sheriff

Service

LAW OFFICES
LOVE, RIGBY, DEHAN, LOVE & McDANIEL
Sixth Floor Johnson Building
P. O. Box 1835
Shreveport, Louisiana 71166

(INDIVIDUAL NAMES OMITTED IN PRINTING)

Phone (318) 226-1880

March 23, 1981

David A. Thompson, M. D.
540 North Central, Suite 207
Glendale, California 91203

RE: Susan Alice Clay vs.
David A. Thompson
Number _____
First Judicial District Court
Caddo Parish, Louisiana

Dear Mr. Thompson:

Under the provisions of LSA-R.S. 13:1704, I enclose to you a certified copy of the petition filed by your former wife, Susan Alice Clay, with respect to the minor child, Matthew Allen Thompson.

LOVE, RIGBY, DEHAN,
LOVE & McDANIEL
/s/ KENNETH RIGBY
KENNETH RIGBY

KR/cb
Enclosure
Certified Mail/Return Receipt Requested
cc: David A. Thompson, M. D.
811 Inverness Drive
Flintridge, California (w/enclosure)



P05 9754919

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL
(See Reverse)

SENT TO
David A. Thompson, M. D.
STREET AND NO.
540 North Central
P.O., STATE AND ZIP CODE
Glendale, California

| | | |
|---|---|---|
| POSTAGE | | $ |
| CERTIFIED FEE | | ¢ |
| SPECIAL DELIVERY | | ¢ |
| RESTRICTED DELIVERY | | ¢ |
| RETURN RECEIPT SERVICE — SHOW TO WHOM AND DATE DELIVERED | | ¢ |
| RETURN RECEIPT SERVICE — SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY | | ¢ |
| RETURN RECEIPT SERVICE — SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY | | ¢ |
| RETURN RECEIPT SERVICE — SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY | | ¢ |
| TOTAL POSTAGE AND FEES | | $ |

POSTMARK OR DATE

CONSULT POSTMASTER FOR FEES
OPTIONAL SERVICES
Form 3800, Apr. 1976

BEST AVAILABLE COPY

BEST AVAILABLE COPY



PS Form 3811, Jan. 1979

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

SENDER: Complete items 1, 2, and 3.
Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one.)
- ☐ Show to whom and date delivered.....¢
- ☐ Show to whom, date and address of delivery....¢
- ☒ RESTRICTED DELIVERY
  Show to whom and date delivered.....¢
- ☐ RESTRICTED DELIVERY.
  Show to whom, date, and address of delivery.$____

(CONSULT POSTMASTER FOR FEES)

2. ARTICLE ADDRESSED TO:

David A. Thompson, M. D., 540 North Central, Glendale, California

3. ARTICLE DESCRIPTION:

| REGISTERED NO. | CERTIFIED NO. | INSURED NO. |
|---|---|---|
| | P05 975491 | |

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐Addressee ☐Authorized agent

C Clarke

4. DATE OF DELIVERY: 3-30-81

POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE:

CLERK'S INITIALS

☆GPO : 1979-280-848



Mr. David A. Thompson
811 Inverness Drive
Flintridge, CA.

RE: Susan Alice Clay v. David A. Thompson Pet. for Filing & Enforcing of Foreign Custody Decree, for Judgment of Custody, & for Modification of Visitation Privileges #277,655, 1st Jud. Dist Court

Dear Mr. Thompson:

We have been appointed by the First Judicial District Court of Caddo Parish, Louisiana to notify you of the above captioned petition. If you wish to contest this matter, please notify me immediately. There is a Rule to Show Cause scheduled for April 7, 1981,

Very truly yours,

FREYER & FOX

Gary L. Fox

GLF/jr
Encl.

BEST AVAILABLE COPY



No. 0264097

# RECEIPT FOR CERTIFIED MAIL

**NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL**

(See Reverse)

| | |
|---|---|
| SENT TO<br>Mr. David A. Thompson | |
| STREET AND NO.<br>811 Inverness Dr | |
| P.O., STATE AND ZIP CODE<br>Flintridge, CA | |
| POSTAGE | $ |
| CERTIFIED FEE ✓ | ¢ |
| SPECIAL DELIVERY | ¢ |
| RESTRICTED DELIVERY | ¢ |
| RETURN RECEIPT SERVICE — SHOW TO WHOM AND DATE DELIVERED | ¢ |
| RETURN RECEIPT SERVICE — SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY | ¢ |
| RETURN RECEIPT SERVICE — SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY | ¢ |
| RETURN RECEIPT SERVICE — SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY | ¢ |
| TOTAL POSTAGE AND FEES | $1.86 |
| POSTMARK OR DATE 3/26 | |

CONSULT POSTMASTER FOR FEES — OPTIONAL SERVICES

PS Form 3800, Apr. 1976



PS Form 3811, Jan. 1973

SENDER: Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one.) 1.86
   - ✓ Show to whom and date delivered..... ¢
   - ☐ Show to whom, date and address of delivery..... ¢
   - ☐ RESTRICTED DELIVERY
     Show to whom and date delivered..... ¢
   - ☐ RESTRICTED DELIVERY.
     Show to whom, date, and address of delivery.$

   (CONSULT POSTMASTER FOR FEES)

2. ARTICLE ADDRESSED TO:
   Mr. David A. Thompson
   811 Inverness Dr.
   Flintridge, CA

3. ARTICLE DESCRIPTION:

| REGISTERED NO. | CERTIFIED NO. | INSURED NO. |
|---|---|---|
| | 0264097 | |

(Always obtain signature of addressee or agent)

I have received the article described above.

SIGNATURE ☐Addressee ☐Authorized agent

T. Thompson

4. DATE OF DELIVERY 3-13-81

POSTMARK — MAR 13 1981

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: — CLERK'S INITIALS

☆GPO : 1979-300-459

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

T COPY

LARK

## RULE TO SHOW CAUSE

(TITLE OMITTED IN PRINTING)

THE STATE OF LOUISIANA, TO,
DAVID A. THOMPSON THRU
GARY L. FOX, CURATOR AD HOC
GREETINGS:

YOU ARE HEREBY ORDERED, DIRECTED AND COMMANDED, in the name of the State of Louisiana and of this Honorable Court, to show cause before this Court on the 7th day of April, 1981, at 10:00 o'clock A.M., why there should not be judgment in favor of plaintiff, Susan Alice Clay, and against defendant, David A. Thompson, awarding unto plaintiff the custody of the minor child, Matthew Allen Thompson, and limiting the visitation privileges of the defendant with the said minor child to the State of Louisiana, at such times and under such conditions as the Court may fix for the welfare and safey (sic) of the said minor child, and for all costs of these proceedings.

ALL as prayed for in the petition this day filed, a copy of which is attached hereto and made a part hereof.

AND HEREIN FAIL NOT.

WITNESS the Honorable Judges of our court on this the 24th day of March, 1981.

/s/ M. Spence
Deputy Clerk



## SHERIFF'S RETURN

Received the within Rule to Show Cause on the 25th day of March, 1981, and on the 25th day of March, 1981, I served the same on the within named David A. Thompson by serving the curator ad hoc Gary L. Fox Atty. in person in Caddo Parish, La.

/s/ C. Wilkinson
Deputy Sheriff, Caddo Parich, La.

FILED
MAR 26 1981
/s/ Carmen Clark
Deputy Clerk

## ORDER

THE ABOVE PETITION AND AFFIDAVIT AND ATTACHMENT CONSIDERED;

IT IS ORDERED that the certified copy of the judgment of the Superior Court of California, County of Los Angeles, in proceedings entitled In Re The Marriage of Susan A. Thompson and David A. Thompson, Docket Number D964318, dated December 4, 1980, wherein petitioner, SUSAN ALICE CLAY, named therein as Susan Alice Thompson, was awarded the sole custody of the minor child, Matthew Allen Thompson, be filed in the office of the clerk of this Honorable Court, under the provisions of LSA-R.S. 13:1714(A) and that, as such, it be decreed to have the same effect and shall be enforced in like manner as a custody decree rendered by this Honorable Court.

IT IS FURTHER ORDERED that Gary L. Fox, Attorney at Law, be and he is hereby appointed curator ad hoc to represent the absentee defendant herein, DAVID A. THOMPSON.

IT IS FURTHER ORDERED that the defendant do show cause, if any he can, on the 7 day of April, 1981, at 10 A.M. o'clock, why there should not be judgment in favor of plaintiff, SUSAN ALICE CLAY, and against defendant, DAVID A. THOMPSON, awarding unto plaintiff the custody of the minor child, Matthew Allen Thompson, and limiting the visitation privileges of the defendant with the said minor child to the State of Louisiana, at such times and under such conditions as the Court may fix for the welfare and safety of the said minor child, and for all costs of these proceedings.

Shreveport, Louisiana, March 24, 1981.

/s/ Gayle K Hamton
JUDGE



| | | |
|---|---|---|
| SUSAN ALICE CLAY | : | SUIT NUMBER 277,655 |
| VERSUS | : | FIRST JUDICIAL DISTRICT COURT |
| DAVID A. THOMPSON | : | CADDO PARISH, LOUISIANA |

## ANSWER OF CURATOR AD HOC

Now into Court comes Gary L. Fox, appointed Curator Ad Hoc, representing the absentee defendant, David A. Thompson, who, with respect answers as follows:

1.

That your Curator was appointed to notify the absentee defendant of the pending litigation that has been instituted against him.

2.

Pursuant to that petition, your Curator mailed a Certified letter, return receipt requested on March 26, 1981 to David A. Thompson, 811 Inverness Drive, Flintridge, CA., the return of which will be introduced into Court at the proper time.

3.

That since your Curator has received the return receipt he has neither heard from nor been contacted by the defendant David A. Thompson, nor anyone on his behalf.

4.

Accordingly, on behalf of the absentee defendant, your Curator denies each and every allegation of fact, except those that are self-proving or provable by the record and asks to be relieved from further responsibility by this Court.

WHEREFORE, your Curator Ad Hoc prays for judgment on behalf of the defendants and that he be relieved from any further responsibility in this matter.

/s/ Gary L. Fox
Gary L. Fox
409 Slattery Building
Shreveport, La. 71101
221-2526

## CERTIFICATE

I certify that a copy of the above and foregoing answer was this date mailed, properly addressed with postage prepaid to attorney for plaintiff, Kenneth Rigby, Love, Rigby, Dehan, Love & McDaniel, 600 Johnson Bldg., Shreveport, La. 71166.

/s/ Gary L. Fox
Gary L. Fox



| | | |
|---|---|---|
| SUSAN ALICE CLAY | • | SUIT NUMBER 277,655 |
| VERSUS | • | FIRST JUDICIAL DISTRICT COURT |
| DAVID A. THOMPSON | • | CADDO PARISH, LOUISIANA |

## JUDGMENT

THIS CAUSE having come on regularly for trial, evidence adduced, and the Court being of the opinion that the law and evidence are in favor thereof, for reasons orally assigned:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, SUSAN ALICE CLAY, and against defendant, DAVID A. THOMPSON, as follows:

(a) Awarding plaintiff the custody of the minor child, Matthew Allen Thompson.

(b) Decreeing that the defendant shall not have any visitation privileges with the said minor child for a period of three months from the date of this judgment.

(c) Decreeing that, thereafter, that the defendant be granted visitation privileges with the said minor child for an additional period of three (3) months, subject to the following restrictions and conditions:
   (1) The visitation shall be limited to the City of Shreveport, Louisiana,
   (2) The visitations shall be during the daytime only, without any overnight visits,
   (3) Shall not exceed four (4) hours in length each,
   (4) Shall be on Saturday and Sunday of the lst weekend of each month,
   (5) And shall be in the physical presence and under the control of a male adult selected by the plaintiff.

(d) The visitation schedule in (c) above shall continue in effect until modified by this Court; however, at the

expiration of the period of visitation in the preceding paragraph, the Court retains jurisdiction to increase, decrease, terminate, or otherwise modify the visitation privileges of the defendant upon the application of either plaintiff or defendant.

(e) Fixing the curator fee of Gary L. Fox at the sum of $60.00 and taxing the same as costs herein.

(f) Casting the defendant with all costs of these proceedings.

JUDGMENT RENDERED, READ, SIGNED AND FILED on the 7 day of April, 1981.

/s/ Charles R. Lindsay
JUDGE

ENDORSED FILED
Carmen Clark, Deputy Clerk
APR 8 1981
A True Copy-Attest
/s/ Carmen Clark
Deputy Clerk



SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 7

HON. HARRY T. SHAFER, JUDGE

In re the marriage of

Petitioner: SUSAN A. THOMPSON
and
Respondent: DAVID A. THOMPSON

No. D964318

REPORTER'S TRANSCRIPT OF PROCEEDINGS
MONDAY, JUNE 15, 1981

APPEARANCES:

For Petitioner: MR. JOSEPH TABACK
10880 Wilshire Boulevard
Los Angeles, California 90024

For respondent: MR. RONALD W. WEISS
1678 West Broadway
Anaheim, California 92802

MAUREEN BRAMMER, CSR 1877

Official Reporter

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LOS ANGELES, CALIFORNIA,
MONDAY, JUNE 15, 1981

DEPARTMENT NO. 7
HON. HARRY T. SHAFER, JUDGE

-o0o-

THE COURT: Susan Thompson represented by —

MR. TABACK: Joseph Taback for the petitioner.

THE COURT: David A. Thompson.

MR. WEISS: Ronald Weiss appearing for the respondent.

THE COURT: D964318. I can't fine *(sic)* the file, but I am familiar with the case.

I am in possession of a declaration of Susan A. Clay, also known as Susan A. Thompson.

I am also in possession of a transcript of proceedings of April 16, and trial summary submitted and filed by Ronald Weiss today.

I haven't reviewed the transcript, but if I recall the case, you had ordered an investigator's report, and Mrs. Thompson was taking either a residency or a professorship at some university in Louisiana.

This was around December. Shortly after she, according to Dr. Thompson — they are both doctors — didn't permit him or interfered with his visitation, so he claims.

And shortly after that she attempted to bestow jurisdication on the State of Louisiana which, of course, I rejected preemptorily.

There is just no way, Mr. Taback, she's going to be able to thwart the jurisdiction of this Court, certainly during the course of the investigation by doing it.

And I am going to direct, if what I think I'm going to do, I will follow it with the direction to the district attorney to take appropriate action.

MR. TABACK: If I may address the Court.

THE COURT: Go ahead.

MR. TABACK: And I address the Court, because today is the date that your Honor has assigned.

As I understand from the record, or the order to show cause re custody brought on by the respondent as well as the followup procedures from December when you gave custody to petitioner and the right to move to Louisiana.

At this time, your Honor, I ask that the reporter's transcript, the original of which you have, be marked as the petitioner's first in order for identification.

Secondly, using that as a reference point, your Honor will find Pages 2 and 3, a reference to the fact that respondent and his counsel had notice of proceedings in Louisiana, and counsel who was present here for the respondent indicated that he would notify the Court concerning that situation, and nothing has been received.

I wish to file now, your Honor, if I may, and ask that it be marked second in order, the proof of service of those proceedings together with supporting documents as petitioner's next in order.

MR. WEISS: Your Honor, those are attached to my trial summary.

THE COURT: They're in here.

MR. TABACK: May I offer this, your Honor?

THE COURT: They are part — they are logged but —

MR. TABACK: I understand they are part of the trial summary.

I should like to lodge that or mark it, your Honor, as next in order.

THE COURT: All right. That will be marked for identification. The transcript is No. 1 for identification.

MR. TABACK: Thank you, your Honor.

THE COURT: The other is No. 2 for identification.



MR. TABACK: Now, third in order for identification, your Honor, is a certified copy of a judgment of custody from the State of Louisiana.

THE COURT: Marked for identification.

MR. TABACK: Thank you, your Honor.

THE COURT: Marked for identification only.

MR. TABACK: Next, and I thank your Honor for permitting me to lodge these documents.

I should like to file with the court next the court transcript of proceedings in Florida.

THE COURT: That's No. 4 for identification only.

MR. TABACK: I should like to have marked as 5 in order the declarations filed with this court on Friday last, which was June the 12th, 1981, which consists of two declarations.

THE COURT: They're lodged.

MR WEISS: I haven't received any declarations. I object to those.

MR. TABACK: I am going to give it to counsel. Show that as 5.

I should like to file as 6 another declaration of Susan A. Thompson.

MR. WEISS: Your Honor, I object to the filing of declarations, your Honor.

Mrs. Thompson is a party to this action, and if she wishes to state something, I feel I should have the right to cross-examine her.

MR. TABACK: I am asking they be marked for identification.

THE COURT: Marked for identification. That doesn't mean they are going to be received.

So far it's very doubtful I'll receive it in evidence. Most of the documents will probably not be received in evidence.

MR. TABACK: Now, if your Honor please, I have in my possession extracts and a document from the entire proceedings from the date of commencement to the present which deal with portions of the Foran report, which I should like to lodge with the court, and subsequently will rely upon if this matter proceedings to hearing, and these documents, your Honor, deal with statements made by Mrs. Foran in her report, and they are statements in contravention thereof together with extracts from transcripts and documents in these very complex and lengthy proceedings which go to rebut the statements made by Miss Foran.

I should like to have these marked collectively as petitioner's next in order.

THE COURT: What would that be, 7.

MR. TABACK: That would be 7, your Honor.

THE COURT: For identification only at this time.

MR. TABACK: And if your Honor please, next for identification I should like to have marked the declaration of Juanita B. McNeal, M.D.

THE COURT: No. 8 for identification.

MR. TABACK: And for No. 9, your Honor, I'd like to have marked for identification a certified copy of an order of a juvenile court from Caddo Parish, Louisiana.

THE COURT: For identification only.

MR. TABACK: Now, if your Honor please, I have two other items.

I should like to have marked as 10 a report dated February 18, 1981, of Paul D. Ware, M.D.

THE COURT: I assume he's another doctor from Louisiana.

MR. TABACK: Yes sir.

And for No. 11, your Honor, with the Court's permission, I'll have to make a copy for counsel, is a report of Dr. Ware dated March 25th, 1981.



THE COURT: Anything else?

MR. TABACK: I have one more document, your Honor, and then I'd like to address the Court.

When we were in court in January, I had lodged with the court a declaration of Susan A. Thompson which I am not certain, because of the handling of the file that has been around quite a bit, dated January 16, 1981, so that there is no uncertainty in the record, I should like to have that declaration marked for identification as petitioner's next in order.

THE COURT: What is it?

MR. TABACK: Declaration of Susan A. Thompson dated January 16.

Now, with the Court's permission I should like to address the Court.

THE COURT: Go ahead.

MR. TABACK: If your Honor please, the purpose of my statement to the Court is threefold.

One, it is in the nature of a motion to stay proceedings.

THE COURT: That will be denied.

MR. TABACK: Well, thank you, your Honor, but I wonder if you might —

THE COURT: You can address the Court, but that one will be denied.

MR. TABACK: Thank you. But I do have permission to address the Court on that?

THE COURT: Go ahead.

MR. TABACK: Thank you, sir.

Your Honor now has before him a judgment of a sister state, State of Louisiana, and proof of service is now on file with the court.

Thirdly, at pages 2 and 3 of the transcript of the proceedings of April 16, 1981, it was clear that the respondent and

his counsel had notice of the proceedings and indicated to your Honor that they would bring it to the Court's attention.

And your Honor indicated that there may be a stay of proceedings.

You wanted to know what was involved.

I submit to your Honor that under the Uniform Custody Act that it would be appropriate for this Court to stay proceedings.

The child has been in Louisiana for six months with his mother, and there has been an investigation, and there has been jurisdication attained by that court.

There has never been an attack on the jurisdiction of Louisiana, either directly or collaterally in this court or out of this court, and I submit to your Honor that in fact the Constitution of the United States directs full faith and credit must be given to that judgment, and I ask, predicated upon that, there be a stay in these proceedings so all proceedings may be coordinated and handled accordingly.

That's point one. Now, I —

THE COURT: Let me address myself to that.

You want to address yourself to that?

MR. WEISS: No, your Honor.

THE COURT: I will not stay proceedings. Full faith and credit means full faith.

I am wondering whether Louisiana had any full faith in this matter.

Furthermore, there are serious questions of estoppal, equity and attempt in my opinion, a purposeful attempt to evade the jurisdiction of California, which had taken over the matter of custody which permitted her to go to Louisiana only because she represented that she had a professorship as a doctor in Louisiana.

She knew full well that the issue had been trusted to this Court, had not been abandoned by this Court, and as far as



I'm concerned, there will be no stay of California proceedings.

That's number one. What's your second request?

MR. TABACK: Thank you, your Honor.

We have filed with the Court the documents that we have, including declarations, and I submit to your Honor that in fact these proceedings — and I say this respectfully, your Honor.

I hope your Honor understands that I certainly do respect this Court.

THE COURT: I know you are representing a client. Go ahead.

MR. TABACK: That these proceedings are in derrogation of the Fourteenth Amendment of the Constitution.

THE COURT: Why?

MR. TABACK: Excuse me, sir?

THE COURT: Go on.

MR. TABACK: As well as the counterpart of the State of California's Constitution in that due process has been denied, both substantively and procedurally to the petitioner for the following reasons.

When this matter was assigned out to this Court, the practice and policy of the Superior Court for the County of Los Angeles, particularly in these type of proceedings, was to have evidenciary hearings.

At no time when this matter as assigned to your Honor did you ever give notice, nor was there ever notice given in this court that in fact testimony would be denied or other evidence not permitted to be put forth.

THE COURT: Just a moment.

All right. You're proceeding with — go ahead — on the Fourteenth Amendment, due process. Go ahead.

MR. TABACK: Thank you, sir.

The state of affairs in this court, in this case, is that in April of 1981, and the transcript is before your Honor, your Honor had indicated his intention of ruling without taking any evidence from the petitioner, without affording any opportunity to examine the party who made the report upon which your Honor relies, but even more gravely, constitutionally, is the fact your Honor indicated you may proceed under the Reifler case, the Reifler case, which I understand to mean you would proceed on papers as opposed to testimony.

I say to your Honor.

THE COURT: Did I say I was going to do that?

MR. TABACK: Yes, sir.

THE COURT: I did not.

MR. TABACK: You said you might proceed.

THE COURT: I might. Did I say I would?

MR. TABACK: Did you?

THE COURT: Yeah.

MR. TABACK: In my opinion, your Honor did.

THE COURT: I will read to you from the transcript that you wanted marked for identification.

MR. TABACK: I am sorry, your Honor. I didn't mean to anger you. In my opinion.

THE COURT: Let me read to you Page 6, Line 12.

> "THE COURT: The Court will determine whether it should be heard according to Reifler or not."

MR. TABACK: That is correct. And that was in the colloquy, your Honor, when I asked to put on evidence, and if your Honor looks at the transcript, you will find that you said words to the effect: there's nothing more. I can move on it right now.

With that statement, your Honor, with the transcript being three days old in this court, coupled —



THE COURT: Where did I say "move on it right now"?

I said the Court has the authority, on Line 14, Page 6 — Line 15.

> "No question the Court has the authority. The Court will determine it at that time."

MR. TABACK: Well, might I just get my copy of the transcript, your Honor, and maybe I will stand corrected.

If I do, I certainly don't mind that.

I was looking, your Honor, at Page 5, Lines 22 and continuing therefrom.

> "THE COURT: I don't know, but I would say" —

excuse me, your Honor, I'd like to start at Line 20.

> "MR. WEISS: May I inquire as to what the Court visualizes for the hearing, how much time.
> "THE COURT: I don't know, but I would say this, that customarily I've got all the reports. I'm ready to move.
> "MR. WEISS: That's what I assume.
> "THE COURT: I'm ready to move. Just argument. That's all. I don't think any testimony is important. I made statements about this doctor in this case. If he wants to appear, that's up to him.
> "MR. TABACK: Of course your Honor will give us an opportunity to present evidence in connection with the report that was quickly filed, your Honor, but a few days before this hearing. The Foran report.
> "THE COURT: What do you mean by 'evidence'? What kind of evidence are you talking about?
> "MR. TABACK: Well, if your Honor please, I really can't even tell the Court, because I just received the report on Monday, and I

haven't even —

"THE COURT: Then the Court will determine whether it should hear — whether it should be heard according ro (sic) Reifler or not. The Court has the authority. No question the Court has the authority. The Court will determine it at that time.

All right. I am saying to your Honor — I am saying to your Honor that reading Pages 5 and 6, and impression at the least, if not an admonition, came forth that in fact the Court had (a) made up its mind; (b) determined the matter and was inclined to foreclose evidence.

And if anything would be allowed, it was merely because of the doctor who made denigrating remarks, as your Honor characterized it, about our judicial system, which I believe troubled your Honor, and you said he could come in and testify in the nature of maybe defending himself.

So I am submitting to your Honor that I believe litigants are entitled to know prior to a hearing what type of evidence they will be permitted to put on, number one.

Number two, I am saying in a child custody matter, do not permit testimony when an investigator has been brought in or even if no investigator is brought in, is of such consequence and magnitude that to foreclose the opportunity to put forth evidence of any kind is an absolute abridgment of the fundamental rights guaranteed to people under the Constitution of the State of California and of the United States.

Thirdly, respectfully I say to your Honor —

THE COURT: Let's take care of number two.

MR. TABACK: I'm not done with number two.

THE COURT: Tell me when you are.

MR. TABACK: Thirdly, your Honor, I believe — and I say this respectfully — that the statements made by your Honor, as depicted in the transcript of April 16, 1981, to the



effect that Louisiana was a hostile territory, that in fact you were ready to move, in fact that the respondent should not visit his child in Louisiana because it was hostile territory, those statements, your Honor, respectfully — and I'm sure that your Honor is motivated by the many years of experience you have on the bench — indicated an absolute prejudice and bias against my client who could not come to this courtroom and have a fair hearing on an issue of custody.

And this issue of custody, I suppose like many custody matters, is volatile, but in fact, has a history in this courthouse of many years.

There were documents filed with this court that relate to child abuse.

I do not stand here and argue the truth or veracity.

I argue the fact that that is before the Court, and in my opinion I submit to the Court that the Court should have taken into consideration by way of evidence.

A full review was required not only for the party litigants but for that child, if anyone else, and on behalf of the child I also object to the proceedings on the foregoing grounds.

THE COURT: All right. Are you through with number two?

MR. TABACK: Yes, sir.

THE COURT: Well, is your client here?

MR. TABACK: My client is not here, your Honor. I was notified at about 6:30 she would not be here.

THE COURT: That's up to her. If she wants to come here, let her come here and subject herself to the jurisdiction of the Court.

The Court still has this jurisdiction, by the way.

With relation to your argument, let's take the one about hostile territory.

I was talking to Dr. Thompson — that's Dr. David A. Thompson.

I said if I were in your shoes, I wouldn't try to exercise it, because you're in hostile territory — referring to visitation.

It's been established as hostile territory.

You betcha it was established as hostile territory. I didn't establish it as hostile territory.

Here's a person who goes to Louisiana, and in derrogation, in violation of a court order of this State has the chutzpah, which may or may not be understood down there, but nonetheless, she goes into court and ex parte or in a fashion which might be considered ex parte, putting him on notice.

I don't know what kind of notice was given, but as far as I'm concerned, he never stood a chance under those circumstances and gets an order.

The order is received, by the way, much before the 16th day of April, 1981, which is the date of this transcript.

How would you expect any court in California to view those proceedings in Louisiana, number one?

So far as due process, the Fourteenth Amendment are concerned, I think I respect them.

I think a lot of these matters should be heard in a Reifler fashion.

I welcome any lawyer to file hearsay documents from doctors, anything he wants, anything that will help the probation officer or the investigator in this case so that it could be of assistance to the Court.

I welcome from the lawyers any statements, the litigants any statements, but I'm not going to welcome, appreciate, accept, endorce, affirm or be in concord with the conduct that was undertaken by Mrs. Thompson in this case.

Absolutely in defiance of this Court, and I think, and with further relation to the Fourteenth Amendment and other due process provisions, that I might say that I taught courses in criminal procedure which were involved particularly with the Bill of Rights and the Fourteenth Amendment.



I might say that Mrs. Thompson's constitutional rights end where my nose begins.

She's given this Court a punch in the nose.

I think we've got a chance — an opportunity rather than a chance. We have the opportunity and should have the opportunity to react and react responsibly.

The way to react responsibly is to turn this matter over to the District Attorney's Office in the event it's necessary.

I think in this particular case it may very well be necessary. What's your third point?

MR. TABACK: Thank you, your Honor.

Might I merely comment briefly with regard to your Honor's remarks that Mrs. Thompson lawfully is under order of this Court, was permitted to go to Louisiana.

Because of an incident that occurred in Louisiana involving the child's welfare and declarations were filed particularly by a police officer in Louisiana, the Juvenile Court of Louisiana intervened.

Subsequently a petition was filed with regard to custody on the counterpart of our Superior Court.

I think all of those acts are lawful acts. They are not acts that violate any court order of the State of California.

They are the rights and privileges of any citizen to seek redress in the courts, wherever they may be situated, and Mrs. — pardon me.

Dr. Clay, who is also Mrs. Thompson in these proceedings, I think acted responsibly, your Honor, and by the invocation of the proceedings in Louisiana did nothing wrong.

The third point, if I may, your Honor, is that I have now had marked for identification some twelve exhibits.

I ask your Honor en masse, and if necessary, to go one by one, that each of these documents be received in evidence, and particularly on the last of your Honor's comment that

you welcome anything to be filed, and I welcome that, your Honor, to know that if your Honor is going to file — to follow Reifler, that you are going to permit that type of proceeding, and I move all of the documents, 1 through 12, be received in evidence on behalf of the petitioner, and I further ask that your Honor take judicial notice of a minute order in the file dated November 8, 1978.

Now, if your Honor has some doubts about certain documents, I would be pleased to go one by one to receive the Court's ruling, and I ask your Honor for some guidance and direction in that area.

THE COURT: They will be lodged with the Court, not received in evidence, which is customary in these cases.

All right. Anything else, Mr. Taback?

MR. TABACK: No, your Honor.

THE COURT: Okay. Anything you want to say, Mr. Weiss?

MR. WEISS: Your Honor, I don't wish to waste the Court's time.

I have been through this with psychiatrists. We had three or four of them on the stand for Dr. Clay in front of a different judge for six days.

Transcripts well over a thousand pages.

It's the same thing that happened here is now happening in Louisiana.

The judge that heard it here found no basis in fact whatsoever. The judge even spent half a day with the child, and that judge's comments are contained in the minute order.

THE COURT: I am aware of that.

MR. WEISS: Outside of that, I have nothing else to say about custody, your Honor.

We do have the issue — we are trying to terminate spousal support.



I don't know how the Court wants to handle that. That's in our request for modification, your Honor.

THE COURT: Well, as I take it, custody is before me. Modification of —

MR WEISS: Spousal support.

THE COURT: Spousal support. What else?

MR. WEISS: That's it, as far as we're concerned.

THE COURT: Any other issues, Mr. Taback?

MR. TABACK: I don't believe spousal support is appropriately retained by this Court.

I think your Honor had the case for custody and would have been improper for your Honor to retain the spousal support issue.

MR. WEISS: I filed —

THE COURT: On what basis?

MR. WEISS: I filed the order to show cause.

THE COURT: You mean there was not an order to show cause?

MR. TABACK: There was an order to show cause regarding — pardon me.

And order to show cause regarding change of custody that was filed while the proceedings were pending.

That appropriately was before your Honor, and I am not certain, but I think by way of stipulation.

However, with regard to spousal support, your Honor, I would look to the Matthews case.

I don't believe your Honor had any right to retain that issue.

I think that rightfully should have gone through the master calendar and been assigned.

THE COURT: Are you saying that an order to show cause was not filed before terminating or modifying the spousal support?

MR. TABACK: No. I'm saying it was filed.

I'm saying it's inappropriate for this Court to hear the matter.

THE COURT: I still don'e *(sic)* know why. It was set the same day as the custody hearing, wasn't it?

MR. TABACK: That's right. Your Honor has no authority to hold that case here, because the procedure is to go through the master calendar to be assigned.

What I am saying is that your Honor has the custody matter, and as I understood the proceedings of December, anything related to custody was to come before your Honor, and that's why that's here.

THE COURT: All right. Anything else you want to say?

MR. TABACK: No, sir. Thank you.

THE COURT: Well, with relation to the spousal support, I won't terminate it, but I'll make it jurisdictional.

I don't know how long they were married. I'll make it jurisdictional, retroactive to the date it was assigned to me.

The reason being that she assured me she was going to a job where she would be able to support herself, and so that alone it would appear that she has no need for support.

Nothing's been presented indicating she doesn't.

MR. WEISS: May I — in the report, your Honor, that she stated she makes thirty-two hundred dollars a month net. It's in the probation report.

THE COURT: All right. With relation to the change of custody, custody matter, in the absence of hearing anything to the contrary, I'm going to make the following order.

That custody of the minor child be awarded to the father, David A. Thompson, effective immediately.

That in the event the assistance of the District Attorney of the State of California is required, the Court will do everything within its power to assist the District Attorney in



performing his functions under the appropriate statutes, and that's it.

MR. TABACK: Thank you, your Honor.

MR. WEISS: Thank you very much.

THE COURT: You want an order prepared?

MR. WEISS: I'll prepare a formal order, submit it to counsel.

MR. TABACK: Might I merely ask that through the Court that we — the privilege to get an expedited copy of the transcript of these proceedings.

THE COURT: Oh, sure.

(Proceedings concluded.)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 7

HON. HARRY T. SHAFER, JUDGE

In re the marriage of

Petitioner: SUSAN A. THOMPSON
and
Respondent: DAVID A. THOMPSON

No. D964318

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA )
) ss
COUNTY OF LOS ANGELES )

I, MAUREEN BRAMMER, Official Reporter of the Superior Court of the State of California, for the County of Los Angeles, do hereby certify that the foregoing pages, 1 through 22, inclusive, comprise a full, true and correct transcript of the proceedings reported by me on June 15, 1981, in the above-entitled matter.

Dated this 18th day of June, 1981.

/s/ Maureen Brammer
Maureen Brammer, CSR 1877
Official Reporter



**ORDER AFTER HEARING**
**(FAMILY LAW)**

ATTORNEY OF PARTY WITHOUT ATTORNEY
(NAME AND ADDRESS) TELEPHONE NO.
RONALD W. WEISS
1678 W. Broadway, Suite 108 (714) 635-4421
Anaheim, California 92802
ATTORNEY FOR (NAME) Respondent
ATTORNEY BAR # 041623

COURT USE ONLY
**FILED**
JUL 14 1981
John J. Corcoran, County Clerk
/s/ A. Misko
By A. Misko, Deputy

**SUPERIOR COURT OF CALIFORNIA,**
**COUNTY OF LOS ANGELES**
Street Address 111 North Hill Street
Mailing Address 111 North Hill Street
City and Zip Code Los Angeles, California
Branch Name

**MARRIAGE OF**
PETITIONER SUSAN A. THOMPSON

RESPONDENT DAVID A. THOMPSON

CLAIMANT

ORDER AFTER HEARING
[x] Modification
[ ] Visitation
[ ] Attorney Fees and Costs
[ ] Injunctive Order
[x] Child Custody
[x] Child Support
[ ] Spousal Support
[ ] Joinder
[ ] Other (Specify):

CASE NUMBER
D 96431

1. This proceeding came on for hearing as follows:
   a. Date: June 15, 1981 [x] Dept.: 7
      [ ] Div.: [ ] Room:
   b. Judge (Name): Harry Schafer
      [ ] Temporary Judge
   c. [ ] Petitioner present in court
      [x] Attorney present in court (Name):
      Joseph Taback
   d. [x] Respondent present in court
      [x] Attorney present in court (Name):
      Ronald W.Weiss
   e. [ ] Claimant present in court
      [ ] Attorney present in court (Name):
   f. [ ] On the Order to Show Cause filed
      On Courts own motion for child custody on
      12-4-80
      Date: January 22, 1981 By: Respondent
   g. [ ] On the Motion filed
      Date: By:
2. [x] Evidence was presented [ ] the parties entered into a stipulation, and the matter was submitted.
3. IT IS ORDERED
   [x] Pending trial or until further order of this court
   [ ] Existing order shall continue in effect, except as modified by this order
   a. [x] Custody and support of the minor children of the parties are fixed as follows

| Child (Name and age): | Custody to: |
|---|---|
| Matthew A. Thompson, 3 | Resp. |
| Monthly Child Support: | Payable by: |
| $ 0 | -- |
| | Payable on: |
| | -- |

   b. [x] Petitioner [ ]Respondent [ ]Claimant shall have
      (1) [x] reasonable visitation rights with the minor children. Only on approval of Court. /s/



      (2) [ ] the following visitation rights:
   c. [ ] Petitioner
      [x] Respondent shall pay as spousal support
      (1) to [x] Petitioner [ ] Respondent
      [ ] Other (specify):
      (2) Amount: $ 0 - the Court retains jurisdiction until Petitioner's death, remarriage or further order of the Court.
      (3) Payable:
   d. [ ] Petitioner [ ] Respondent shall pay on account to attorney (name):
      (1) [ ] Fees: $ payable:
      (2) [ ] Costs: $ payable:
   e. [ ] Petitioner is excluded from
      (1) [ ] The family dwelling at (address):

      (2) [ ] Respondent's dwelling at (address):

      (3) [ ] Effective (date and time):

   f. [ ] Respondent is excluded from
      (1) [ ] The family dwelling at (address):

      (2) [ ] Petitioner's dwelling at (address):

      (3) [ ] Effective (date and time):
   g. [ ] Petitioner is restrained from molesting or disturbing the peace of respondent
      [ ] and any person under the care, custody or control of respondent.
   h. [ ] Respondent is restrained from molesting or disturbing the peace of petitioner
      [ ] and any person under the care, custody or control of petitioner.

i. [ ] Petitioner [ ] Respondent [ ] Claimant is restrained from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, except in the usual course of business or for the necessities of life.

j. [ ] Claimant is joined as a party to this proceeding
(1) Claimant (name):
(2) [ ] The clerk shall file the original of the submitted pleading.
(3) [ ] Summons (Joinder) be issued and claimant be served with a copy of the motion for joinder with pleading attached, a copy of this order and a copy of the Summons (Joinder).

k. [ ] Decision on all other issues is reserved to time of trial.

l. [ ] Other (specify):

Dated: 7-14-81 ..... /s/ Harry Shafer
Judge of the Superior Court

4. Total number of boxes checked in item 3:
5. Approved as conforming to court order.

Dated: .....
Signature of Attorney for Petitioner
JOSEPH TABACK



RONALD W. WEISS
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Attorneys for Plaintiff

FILED
AUG 12 9:45 AM '83
CLERK, U.S. DISTRICT COURT
CENTRAL DIST OF CALIF

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNA

DAVID A. THOMPSON,
Plaintiff,
vs.
SUSAN A. THOMPSON, a/k/a SUSAN A CLAY,
Defendant.

CASE NO. 83 5221 AAH (Gx)
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, DAVID A. THOMPSON, alleges as follows:

THE PARTIES

1. Plaintiff is an individual who resides in the State of California within the above district and who is a citizen of California.

2. Defendant, Susan A. Thompson, resides in the City of Shreveport, Louisiana, and is a citizen of the State of Louisiana.

JURISDICTION

3. This Court has jurisdiction pursuant to 28 U.S.C. 1332 (Diversity of Citizenship) and 28 U.S.C. 1331 (Claim Arising Under the Constitution, Laws or Treaties of the United States) and the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs.

FIRST CAUSE OF ACTION
(DECLARATORY RELIEF)

4. Sometime in 1979, Defendant, Susan A. Thompson, commenced an action for dissolution of marriage against Plaintiff, David A. Thompson, in the Superior Court of California, County of Los Angeles, Case No. D-964318, and thus subjected her to the jurisdiction of said Court and of California. At that time, Susan A. Thompson was a resident of the State of California. The issues involved in said action involved, among other things, a custody dispute with respect to the parties' minor child, Matthew A. Thompson, born August 9, 1977.

5. In October, 1979, both parties were awarded joint legal custody on a temporary basis pending trial in said California State Court. Thereafter, and in December, 1980, Defendant, Susan A. Thompson, removed herself and said minor child to the State of Louisiana and in March, 1981, commenced an action in Caddo Parish, Louisiana, to establish custody over said minor child. The Petition in said action, Case No. 277,655, alleges, among other things, that Defendant moved to the State of Louisiana on or about December 12, 1980, and alleges that California had rendered a custody decree.

6. In April, 1981, the above Court of the State of Louisiana awarded custody of said minor child to Defendant.

7. At no time did Plaintiff subject himself to the jurisdiction of the State of Louisiana.

8. In 1981, Plaintiff, David A. Thompson, was awarded sole custody over the minor child by the State of California in the above-referenced California action.



9. Article IV, Section 1, of the United States Constitution provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every State And the Congress made by general Laws prescribe the Manner in which said Acts, Records and Proceedings shall be proved, and the Effect thereof."

10. 28 U.S.C. 1738 was enacted to implement Article IV of the United States Constitution. 28 U.S.C. 1738A was enacted to implement Article IV with respect to all custody matters, was made effective December 28, 1980, and provides, among other things, in Sub-section (g):

> "A court of a state shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another state where such court of that other state is exercising jurisdiction consistently with the provisions of this section to make a custody determination."

11. At the time that Defendant commenced the above Louisiana action and at all subsequent times, there was and still is pending an action in the Superior Court of the State of California regarding custody of the minor child and, accordingly, said Louisiana Court Decree is invalid as being contrary to the above Federal Statute and Constitutional provision.

12. Defendant contends that the Louisiana Judgment is valid and determines the custody and visitation relationships between the parties.

13. Plaintiff contends that the Louisiana Decree is invalid and that the California Decree determines the relationship between the parties with respect to custody.

14. There is an actual controversy between the parties as to which State Order determines the custody over the minor child.

15. Plaintiff has no adequate remedy at law and is entitled to a declaratory judgment determining that any Orders issued by the California Court determines the custody to the minor child throughout the United States, and that the above-described Order by the State of Louisiana is invalid as being contrary to the provisions of Article IV of the United States Constitution and contrary to 28 U.S.C. 1738 and 28 U.S.C. 1738A.

SECOND CAUSE OF ACTION
(INJUNCTION AGAINST ENFORCEMENT OF LOUISIANA ORDER)

16. Plaintiff incorporates herein by reference each and everyone of the foregoing allegations.

17. The above-described Louisiana custody Order is invalid as being contrary to Article IV of the United States Constitution and contrary to the provisions of 28 U.S.C. 1738 and 28 U.S.C. 1738A.

18. Plaintiff is entitled to an Order that said Louisiana Order be declared invalid and have no further force and effect.

19. Plaintiff is entitled to a preliminary and permanent injunction enjoining the enforcement of said Louisiana Order and to appropriate equitable relief.

WHEREFORE, Plaintiff prays that the Court issue a preliminary and permanent injunction declaring that said Louisiana Judgment is invalid and that the California Order is valid and determines the custody as to the minor child, Matthew; that until such time as California issues a permanent custody decree, that all custody disputes shall be determined by the appropriate Court in the State of California; for costs of suit and further relief as the Court deems just.



Dated: August 11, 1983

/s/ Ronald W. Weiss
RONALD W. WEISS

Dated: August 11, 1983

/s/ Stuart W. Knight
STUART W. KNIGHT
Attorneys for Plaintiff

## CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of the Court for the purpose of initiating the civil docket sheet. (For more detailed instructions, see separate instruction sheet.)

PLAINTIFFS DAVID A THOMPSON

County of residence of first listed plaintiff Los Angeles (except in U.S. Plaintiff cases)

DEFENDANTS SUSAN A. THOMPSON, a/k/a SUSAN A CLAY,

County of residence of first listed defendant (in U.S. Plaintiff cases only)
NOTE: in land condemnation cases,use the location of the tract of land involved

---

ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

RONALD W.WEISS
STUART W. KNIGHT, Attorneys at Law
13522 Newport Avenue, Suite 201
Tustin, California 92680
(714) 730-5261 or (714) 730-4808

---

### BASIS OF JURISDICTION

(PLACE AN [X] IN ONE BOX ONLY)
[ ] 1 U.S. PLAINTIFF [ ] 2 U.S. DEFENDANT
[X] 3 FEDERAL QUESTION (U.S. NOT A PARTY)
[X] 4 DIVERSITY IF DIVERSITY, INDICATE CITIZENSHIP ON REVERSE. (28 USC 1332, 1441)



CAUSE OF ACTION (CITE THE U.S. CIVIL STATUE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE)
Declaratory relief, 28 U.S.C. 2201 and 28 U.S.C. 1738A

### NATURE OF SUIT

(PLACE AN [X] IN ONE BOX ONLY)
ACTIONS UNDER STATUTES
OTHER STATUTES
[X] 890 OTHER STATUTORY ACTIONS

(IRRELEVANT AND UNMARKED SECTIONS OF COURT FORM DELETED IN PRINTING)

(PLACE AN [X] IN ONE BOX ONLY)
[X] 1 Original Proceeding
[ ] 2 Removed from State Court
[ ] 3 Remanded from Appellate Court
[ ] 4 Reinstated or Reopened
[ ] 5 Transferred from another district (specify)
[ ] 6 Multidistrict Litigation
[ ] 7 Appeal to District Judge from Magistrate Judgment

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UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NOTICE OF ASSIGNMENT TO
UNITED STATES MAGISTRATE

Pursuant to the Local Rules Governing Duties of Magistrates, Magistrate Ralph J. Geffen has been designated to hear discovery motions in the within action at the discretion of the assigned Judge.

Upon the filing of a discovery motion, the motion will be presented to the United States District Judge for consideration and may hereafter be referred to the Magistrate for hearing and determination.

The Magistrate's initial should be used on all documents filed with the Court so that the case number reads as follows:

CV - 83 5221 AAH (Gx)

NOTE: A COPY OF THIS NOTICE MUST BE SERVED WITH THE SUMMONS AND COMPLAINT ON ALL DEFENDANTS.



RUSTON & NANCE, INC.
Law Offices
111 Fashion Lane
First Street at Fashion Lane
Tustin, California 92680
Telephone (714) 832-2220
Attorneys for Defendant,
Susan A. Thompson, a/k/a Susan A. Clay

FILED
JAN 24 1984
Clerk, U.S. District Court
Central District of California
/s/ WA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(TITLE OMITTED IN PRINTING)

NO. CV-83 5221 AAH (Gx)
NOTICE OF MOTION TO DISMISS COMPLAINT

Hearing Date: March 5, 1984
Time: 10:00 A.M. Department: One

TO: PLAINTIFF, DAVID A. THOMPSON, AND TO HIS ATTORNEY OF RECORD HEREIN:

PLEASE TAKE NOTICE that the Motion to Dismiss of specially appearing defendant, SUSAN A. THOMPSON, a/k/a SUSAN A. CLAY, will be heard on March 5, 1984 at 10:00 a.m., or as soon thereafter as counsel may be heard in Courtroom 1, before the Honorable A. Andrew Hauk of the United States District Court, Central District of California, located at 312 North Spring Street, Los Angeles, California.

DATED: January 23, 1984

RUSTON & NANCE, INC.

By /s/ Nancy E. Zeltzer
NANCY E. ZELTZER
Attorneys for defendant,
Susan A. Thompson,
a/k/a Susan A. Clay

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Attorneys for Specially Appearing Defendant,
Susan A. Thompson, a/k/a Susan A. Clay

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(TITLE OMITTED IN PRINTING)

NO. CV-83 5221 AAH (Gx)

MOTION TO DISMISS COMPLAINT;
MEMORANDUM OF POINTS AND AUTHORITIES;
AFFIDAVIT OF COUNSEL

Hearing Date: March 5, 1984
Time: 10:00 A.M. Department: One

SPECIALLY APPEARING DEFENDANT, SUSAN A. THOMPSON, a/k/a/ SUSAN A. CLAY, respectfully moves the court as follows:

1. To dismiss the action of the ground that the court lacks jurisdiction over the subject matter;

2. To dismiss the action on the ground that the court lacks jurisdiction over the person;

3. To dismiss the action on the ground of improper venue; or,

4. To transfer this action to the district which this court deems proper.

DATED: January 23, 1984.

(JURAT OMITTED)



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MEMORANDUM OF POINTS AND AUTHORITIES

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MEMORANDUM OF POINTS AND AUTHORITIES

I

## AUTHORITY FOR THE MAKING OF A MOTION TO DISMISS

The Federal Rules of Civil Procedure, Rule 12, 28 U.S.C. provides where pertinent:

> "(b) HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may be at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted."

II

## PLAINTIFF'S COMPLAINT REVEALS A LACK OF JURISDICTION OVER THE SUBJECT MATTER.

A. According to the allegations contained on the face of plaintiff's Complaint, plaintiff DAVID A. THOMPSON and the defendant SUSAN A. THOMPSON were divorced in 1979. A custody dispute arose with respect to the parties' minor child, MATTHEW A. THOMPSON. (Plaintiff's Complaint, paragraph 4).

In October of 1979, both parties were awarded joint legal custody on a temporary basis pending trial, in Los Angeles Superior Court. (Plaintiff's Complaint, paragraph 5).

The plaintiff further contends that the defendant removed herself and said minor to the State of Louisiana, and commenced a custody action in Caddo Parish, Louisiana, in April of 1981. Said court awarded custody of the minor child to defendant. (Plaintiff's Complaint, paragraphs 5 and 6).

Plaintiff then contends that he was awarded custody of the child in a 1981 California state action. (Plaintiff's Complaint, paragraph 8).

The plaintiff has brought the within action to decide which of the above state court Orders determines custody over the minor child.

However, defendant submits that this court does not have jurisdiction to hear plaintiff's Complaint.

The United States Supreme Court case of *Webb v. Webb* (1981) 451 U.S. 493, 68 L.Ed.2d 392, 101 S.Ct. 1889, is precisely on point in this matter.

In said action, a mother was granted custody of her minor child as a result of a Florida state court action. The father of the child was granted custody by a Georgia state court action. On appeal, the Georgia Supreme Court affirmed the decision of the lower Georgia court. The mother filed a certiorari petition in the United States Supreme Court, demanding that Georgia give full faith and credit pursuant to Article IV, §1 of the U.S. Constitution to the Florida decree, as it was rendered first. The United States Supreme Court dismissed the writ for want of jurisdiction. The court said, at page 398:

> ". . . there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act to be presented first to the state courts."



The court further held that whether or not a state court properly assumed jurisdiction under the Uniform Child Custody Jurisdiction is "purely a question of state law not properly subject to review in this court."

*Webb v. Webb, supra,* was heard shortly after Congress codified provisions for state versus state conflicts in child custody cases. Said statute is 28 U.S.C. §1738A, which provides in pertinent part as follows:

> "(a) The appropriate authorities of every state shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another state."

Section (f) provides as follows:

> "(f) A court of a state may modify a determination of the custody of the same child made by a court of another state, if -
> "(1) it has jurisdiction to make such a child custody determination; and
> "(2) the court of the other state no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination."

The statute cited above clearly reveals Congress' specific intention to have child custody cases heard at the state level, and not the federal level. This intention is further demonstrated by reviewing the Congressional Findings and Declaration of Purposes for enacting 28 U.S.C. §1738A. Said Congressional findings state in pertinent part as follows:

> "The general purposes of . . . tnis Act . . . are to -
> "(1) promote cooperation between state courts to the end that a determination of custody and visitation is rendered in the state which can best decide the case in the interest of the child, . . ."

B. As shown supra, this court does not have subject matter jurisdiction to hear the present action. Moreover,

defendant further submits that subject matter jurisdiction is not vested in any court of the State of California.

California's Uniform Child Custody Jurisdiction Act is found in Civil Code, Sections 5150 et seq. Civil Code, §5152 outlines four (4) jurisdictional requirements, one of which must exist before California can exercise jurisdiction over a particular child custody case. Civil Code, §5152 provides as follows:

> "(1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if the conditions as set forth in any of the following paragraphs are met:
> "(a) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state.
> "(b) It is the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.
> "(c) The child is physically present in this state and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent.
> "(d) (i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (a), (b), (c), or another



> state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.
> "(2) Except under paragraphs (c) and (d) of subdivision (1), physicial presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.
> "(3) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody."

The face of plaintiff's Complaint shows that none of the four (4) conditions is present in the instant case.

In Paragraph 5 of plaintiff's Complaint, plaintiff states that "in December of 1980, defendant, SUSAN A. THOMPSON, removed herself and said minor child to the State of Louisiana." As the within action was filed on August 12, 1983, it is clear that California was not the child's home state at the time of commencement of the within proceeding, nor had it been the child's home state within six (6) months of the commencement of the within proceeding. Thus, the first jurisdictional requirement, part (a), has not been satisified.

The plaintiff has not alleged in his Complaint that the child has a significant connection with California. Thus, the second jurisdiction requirement, part (b), has not been satisfied.

Part (c) is an emergency protection provision for children who are present in the State of California, and have either been mistreated or abandoned. As paragraph 5 of plaintiff's Complaint states that the child is in Louisiana, and as plaintiff has made no allegations of mistreatment or abandonment, the State of California cannot obtain jurisdiction pursuant to part (c).

With reference to subparagraph (d) above, plaintiff states in Paragraph 6 of the Complaint that "the above court of the State of Louisiana awarded custody of said minor child to defendant." Thus, another state has exercised jurisdiction over the custody of the minor child herein, and jurisdiction would be properly vested in the State of Louisiana pursuant to subparagraph (a) of Section 5152.

Thus, it is clear that plaintiff's Complaint fails to allege even one of the necessary requirements which would vest jurisdiction in a California court.

However, plaintiff contends that 28 U.S.C. 1738A, section (g) contains a provision that makes Louisiana's jurisdiction improper and makes California's jurisdiction proper. That section reads as follows:

> "(g) A court of a state shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another state where such court of that other state is exercising jurisdiction consistently with the provisions of this section to make a custody determination."

Plaintiff contends that the State of California had pending jurisdiction over the custody matter at the time defendant went to the State of Louisiana and obtained her April 1981 custody decision. However, the Superior Court of California, County of Los Angeles, ended California's jurisdiction over the minor child of plaintiff and defendant by Court Order on December 4, 1980. Said Order states as follows:

> "Present order of custody remains in effect until petitioner moves to Louisiana; then custody shall be solely with her without prejudice . . ."

As matter outside a Complaint may be introduced as a factual attack on jurisdiction at the pleading stage, see *Williamson v. Tucker*, (5th Cir. 1980) 632 F.2d 579; *Menchaca v. Chrysler Credit Corp.* (5th Cir. 1980) 613 F.2d 507, cert den 101 S.Ct. 358, and *Oaxaca v. Roscoe*, C.A.



Tex. 1981, 641 F.2d 386, defendant hereby attaches a certified copy of said Order of December 4, 1980, as Exhibit "A" herein.

Thus, it is clear that when defendant obtained the April 1981 Louisiana custody decree, there was no action pending in California concerning custody.

III

## THIS COURT LACKS IN PERSONAM JURISDICTION OVER THE DEFENDANT.

As set forth in the attached affidavit of counsel, service of the Complaint was purportedly accomplished by personal service of the pleadings upon defendant, SUSAN A. THOMPSON, a/k/a/ SUSAN A. CLAY, in Shreveport, Louisiana.

Rule 4(f) of the Federal Rules of Civil Procedure sets forth the territorial limits of effective service of a Summons and Complaint:

> "(f) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, "persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1) - (6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of

commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45."

The purported service upon defendant was allegedly accomplished in the State of Louisiana, more than 100 miles from this court.

Thus the federal court must adopt the state statute to extend the acquisition of personal jurisdiction over a defendant in a federal action who is served outside of the boundaries of the state in which the court sits. Therefore, plaintiff must establish that defendant, SUSAN A. THOMPSON, a/k/a SUSAN A. CLAY, is amenable to such extended service of process under the California statutes permitting service outside of the boundaries of the State of California.

Although California Code of Civil Procedure, §413.10, which this court may observe, provides that ". . .a summons shall be served on a person . . . outside this state, but within the United States, as provided by this chapter . . ." and personal service on out-of-state residents is authorized by §415.10 of the California Code of Civil Procedure, such service presupposes that there is some basis upon which a court may exercise jurisdiction over the non-resident defendant served in such a manner. California's long-arm statute, Section 410.10, perhaps the broadest of all state statutes of this nature, restricts jurisdiction of the courts of this state to ". . . any basis not inconsistent with the Constitution of this state or of the United States." Thus jurisdiction of a California court at its broadest is based on the underlying constitutional due process principle of a defendant's relationship to or contact with this state which makes the exercise of its jurisdiction reasonable.

It is apparent, under the circumstances of this case, that there is no constitutionally sufficient basis upon which jurisdiction of this court may be exercised over the person of the defendant; there exists no contact between the State of California and this non-resident defendant upon which



jurisdiction may be predicated, which jurisdiction is vital to determination of this action.

The traditional basis of personal jurisdiction include presence within the state seeking to exercise such jurisdiction, evidenced by citizenship, domicile, residence, or even transitory presence of the defendant at the time of service of process. Consent, either express or implied, is also a valid basis on *In Personam* jurisdiction, as is doing business within a state. In the landmark case of *Washington v. International Shoe*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), the supreme court of the United States extended the basis for exercise of personal jurisdiction to include constitutionally sufficient "minimum contacts" with the forum state. It stated that ". . . due process requires that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." 326 U.S. at 316.

In *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), the supreme court re-evaluated the test it announced in *International Shoe* and served warning that there are constitutional limits to the reach of long-arm statutes and that state boundaries still have jurisdictional significance. *Hanson* concerned the attempt of a Florida court to obtain *in personam* jurisdiction over a Delaware trustee who had been administering a trust created by a testatrix when she was domiciled in Pennsylvania, but who later relocated in Florida. Notwithstanding considerable business correspondence flowing between the testatrix and trustee, the court held that the contacts of the trustee with the State of Florida were insufficient to satisfy due process requirements. The court made if very clear that "[t]he unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state . . . it is essential in each case that there be some act by which the defendant purposefully

avails [himself] of the privilege of the conducting activities within the forum State, thus invoking the benefits and protections of its laws." 357 U.S. at 253.

In the instant matter all plaintiff has asserted is that defendant lived in California prior to December of 1980.

The United States Supreme Court case of *Kulko v. California Supreme Court*, (1978) 436 U.S. 84, is instructive.

In said action, the parties were divorced, and each parent wanted custody of their two (2) children. The mother, a resident of California, attempted to obtain *in personam* jurisdiction over the father, a New York resident, to enable a California court to hear the custody case. A California Superior Court and the California Supreme Court both concluded that the father had caused an "effect" in California by sending his children to California to visit the mother.

The United States Supreme Court reversed, stating as follows:

> "The Due Process Clause of the Fourteenth Amendment operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants. . .
> "In reaching its result, the California Supreme Court did not rely on appellant's glancing presence in the state some 13 years before the events that led to this controversy, nor could it have. . .
> "to find personal jurisdiction in a state on this basis [of visitation rights] . . . would discourage parents from entering into reasonable visitation agreements. . .
> "In light of our conclusion that appellant did not purposefully derive benefit from any activities relating to the State of California, it is apparent that the California Supreme Court's reliance on appellant's having caused an 'effect' in California was misplaced . . ."



Plaintiff's Complaint lacks any allegation that the service of process upon defendant was proper. Plaintiff has only stated one "contact" between defendant and the State of California, and that "contact" is the current custody dispute between plaintiff and defendant. As shown supra, this "contact" alone is not sufficient to make defendant amenable to service of process for the instant action.

As plaintiff cannot satisfy the requirement of defendant's presence within the State of California at the time of service of process upon it and has failed to allege a constitutionally sufficient contact between California and defendant herein to authorize out-of-state service on her, this court is compelled to find that service of process upon defendant is ineffectual for the purpose of acquiring jurisdiction over her and this action cannot be maintained against defendant due to such lack of personal jurisdiction over the defendant.

## IV

## THE COMPLAINT HAS BEEN BROUGHT IN AN IMPROPER VENUE.

If the court should decide that subject matter and *in personam* jurisdiction do exist in the present action, then it is requested that this court decide that the Complaint herein has been brought in an improper venue.

Defendant moves that this action be dismissed for lack of proper venue, or, if it be deemed in the interest of justice, that this action be transferred under 28 U.S.C. §1406(a) to the United States District Court of Louisiana, First Judicial District, located in Caddo Parish, Louisiana, in which the action could have been brought, on the following grounds:

1. Defendant does not reside in this district, but in fact resides in Louisiana, in the First Judicial District, located in Caddo Parish, Louisiana.

2. This is an action in which venue must be laid under 28 U.S.C. §1391(a).

A review of Paragraph 3 of plaintiff's Complaint shows that plaintiff is contending that jurisdiction in the present action does not exist solely because of diversity of citizenship.

28 U.S.C. §1391 provides in pertinent part as follows:

> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."

Thus, plaintiff's Complaint can only be brought where defendant resides, or where the claim herein arose.

Defendant resides in Louisiana, as shown in paragraph 5 of plaintiff's Complaint.

The specific matter of which plaintiff is complaining is the Louisiana custody decree. If Louisiana had never awarded custody to defendant, plaintiff would have no claim. Thus, it appears that the claim herein arose in Louisiana.

This is further supported by the court in *Rios v. Marshall,* D.C., N.Y., 1981 530 F.Supp. 351, which stated that in determining where a claim arose, an applicable standard is the weight of the defendant's contacts with the various judicial districts. As shown supra, defendant's contacts lie within the Louisiana judicial district.

As plaintiff's Complaint fails to allege any reason as to why the proper venue for the Complaint is California, and as the statutory provisions of 28 U.S.C. §1391 show that the proper venue for plaintiff's Complaint is Louisiana, it is clear that plaintiff's Complaint has been brought in an improper venue.



WHEREFORE, based upon all of the foregoing, defendant, SUSAN A. THOMPSON, a/k/a SUSAN A. CLAY, respectfully prays that this Motion to Dismiss be granted and that this action be dismissed as to said specially appearing defendant, or, in the alternative, that this action be transferred to the district court which this court deems proper under all of the circumstances present herein.

DATED: January 23, 1984.

Respectfully submitted,

RUSTON & NANCE, INC.

By /s/ Nancy E. Zeltzer
NANCY E. ZELTZER
Attorneys for defendant
Susan A. Thompson, a/k/a
Susan A. Clay

AFFIDAVIT OF NANCY E. ZELTZER IN SUPPORT OF MOTION TO DISMISS COMPLAINT

STATE OF CALIFORNIA )
ss.
COUNTY OF ORANGE )

I, NANCY E. ZELTZER, being first duly sworn, depose and say:

That I am an attorney at law, duly licensed to practice as such in the courts of the State of California and sworn to practice in the United States District Court, Central District of California. Further, I am a member of the law firm of Ruston & Nance, Inc., attorneys of record for specially appearing defendant, SUSAN A. THOMPSON, a/k/a SUSAN A. CLAY.

That with reference to the facts set forth below, I have been informed of such facts and personally believe them to be true.

That I am informed that service of the Summons and Complaint in this action was effected upon defendant, SUSAN A. THOMPSON, a/k/a SUSAN A. CLAY, on or about December 15, 1983, in the State of Louisiana.

I have been informed that defendant, SUSAN A. THOMPSON, a/k/a SUSAN A. CLAY, along with her minor child, Matthew Thompson, moved to Louisiana in December of 1980, and both persons are currently and continue to be residents of Louisiana.

That this Motion to Dismiss plaintiff's Complaint has been made bona fide and not for the purposes of delay.

I declare under the penalty of perjury that the foregoing is true and correct.



Executed this 23rd day of January, 1984, at Tustin, California.

/s/ Nancy E. Zeltzer
NANCY E. ZELTZER

Subscribed and sworn to before
me this 23rd day of January 1984.

/s/ Penny L. Endicott
NOTARY PUBLIC IN SAID
COUNTY AND STATE

OFFICIAL SEAL
PENNY L ENDICOTT
NOTARY PUBLIC - CALIFORNIA
ORANGE COUNTY
My comm. expires MAY 9, 1986
111 Fashion Lane, Tustin, CA 92680

RONALD W. WEISS
(Tustin address omitted)
STUART W. KNIGHT
(Tustin address omitted)
714/730-4808
Attorney for Petitioner

FILED
FEB 27 1984
Clerk U.S. District Court
Central District of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(TITLE OMITTED IN PRINTING)

CASE NO. CV 83-5221 AAH (Gx)

OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS COMPLAINT

Date: March 19, 1984 (cont. from March 5, 1984)
Time: 10:00 a.m. Courtroom: 1

Plaintiff, DAVID A. THOMPSON, hereby opposes Defendant's Motion to Dismiss based on the accompanying Memorandum of Points and Authorities and declarations.
Dated: February 22, 1984

/s/ Stuart W. Knight
STUART W. KNIGHT
Attorney for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

## I. PLAINTIFF'S ACTION AND THE BASIC FACTS SURROUNDING PLAINTIFF'S ACTION.

Plaintiff, David A. Thompson, and Defendant, Susan A. Thompson, resided in California for some time prior to 1979, were husband and wife, and had a minor child, Matthew A. Thompson, born August 9, 1977, to the parties.

Defendant herein, Susan A. Thompson, commenced an action for dissolution of marriage in the Superior Court of California, County of Los Angeles, some time in 1979, and subjected herself to the jursidiction of said Court. In October, 1979, Plaintiff, David A. Thompson, and Defendant, Susan A. Thompson, were awarded joint legal custody on a temporary basis pending trial in the California State Court.

On or about December 20, 1980, Susan A. Thompson obtained the temporary order attached to her motion to dismiss which gave her temporary custody; permitted her to move to the State of Louisiana; and afforded David A. Thompson extended visitation rights, pending further proceedings.

Susan A. Thompson removed the parties' child, Matthew, to Louisiana; refused to permit the subject visitation rights; and immediately commenced an action in Louisiana State Court to establish custody over Matthew by a petition filed March, 1981, Case. No. 277, 655 in Caddo Parish, Louisiana. In April, 1981, such Court awarded custody of Matthew to Susan A. Thompson.

Plaintiff herein, David A. Thompson, did not appear in the Louisiana action and said Louisiana custody award to Susan A. Thompson was by default.

Subsequently, and on June 15, 1981, pursuant to a modification proceeding brought by David A. Thompson, the California State Court awarded custody of Matthew to

David A. Thompson, a true copy of which is attached to the declaration of Ronald W. Weiss, which accompanies this opposition. The California Court granted reasonable visitation rights to Susan A. Thompson "only on approval of Court." Needless to say, the California State Court considered Susan's actions not to be in the best interests of the child, Matthew.

Accordingly, there exists a situation where a California State Court renders a temporary custody award, pending trial, to the mother; the mother flees the California jurisdiction to Louisiana and obtains a permanent Louisiana order based on a default judgment; and the father obtains a California custody award in the original California proceedings.

It appears obvious that Susan A. Thompson left the State of California and obtained the Louisiana decree simply to obtain a forum which would best serve her obtaining custody to Matthew and to escape the adverse effects of an anticipated California custody award.

Plaintiff, David A. Thompson, has filed this action in Federal Court in order to establish that the Louisiana decree is without force and effect so that he can enforce his California custody decree. Plaintiff requests a declaratory judgment as to which state custody order establishes custody to the parties' child, Matthew, and for injunctive relief restraining enforcement of the Louisiana order.

## II. THE LOUISIANA CUSTODY DECREE VIOLATES 28 U.S.C. 1738A AND IS INVALID.

The subject federal statute, 28 U.S.C. 1738A, provides, in part, that:

> "The appropriate authorities of every state shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another state.
>
> (f) A court of a state may modify a determination of the custody of the same child made by a court of another state if (1) it has jurisdiction to make a child custody determination; *and* (2) *the court of the other state no long has jurisdiction*, or it has declined to exercise such jurisdiction to modify such determination.
>
> (g) A court of a state shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another state where such court of that state is exercising jurisdiction consistently with the provisions of this section to make a custody determination."



Stated differently, the above statute provides that one state shall not entertain custody matters while custody issues are pending in a sister state.

The obvious purpose of the above federal act is to avoid sister state conflicts as is presented in the case herein.

Congress specifically found that there was a "large and growing number of cases annually involving disputes between persons claiming rights of custody and visitation of children under the laws, and in the courts of different states" and that the proposed legislation had the purpose to promote cooperation between the state courts; to facilitate the enforcement of custody and visitation decrees of sister states; to discourage continuing interstate controversies; to avoid jurisdictional competition and conflicts between state courts; and to deter interstate abductions and other unilateral removals of children. The Court is respectfully referred to the notations contained in the *Annotated United Stated Code*.

California and Louisiana have the "Uniform Child Custody Act" which has the same general purpose of the above federal statute. Unfortunately, however, each sister state can determine its own jurisdiction and can render its own interpretation of its "Uniform Child Custody Act." California enacted its "Uniform Child Custody Act" in 1973 and apparently Congress, in enacting the above federal statute in 1980, concluded that the states' respective "Uniform Child Custody Acts" had no real "teeth" such that a federal statute is necessary.

Defendant has violated 28 U.S.C. 1738A by obtaining a Louisiana custody order while the custody dispute was pending in California pursuant to a petition Defendant brought in California for custody determination.

It is respectfully submitted that the Federal Courts should entertain jurisdiction over citizens of different states to enforce the above federal statute. Otherwise, parties to custody disputes will be free to simply remove the child from a state and seek modification or approval of any sister state custody order in another state, and the existing "chaos" sought to be prevented by both state and federal statutes will continue and grow.

It is apparent that Congress intended some stability to the existing problem and thus Plaintiff requests that this Court issue a ruling as to (1) whether Louisiana's order is valid and (2) which court has proper jurisdiction to determine the custody over the child, Matthew.

## III. THIS COURT HAS JURISDICTION EVEN THOUGH THE MATTER CONCERNS DOMESTIC RELATIONS.

The general rule is that Federal Courts do not entertain jurisdiction over domestic matters since the state courts can best determine such issues. However, there are numerous exceptions to the above general rule and the Federal Courts have taken jurisdiction to void invalid state decrees and to



issue proper injunctions against enforcement of sister state decrees.

In *Southard v. Southard, 305* F.2d 730 (2d Cir. 1962), plaintiff sought declaratory relief to determine whether a certain Connecticut decree was valid or invalid which involved domestic relations. The Court took jurisdiction of the issue and indicated that declaratory relief is proper to determine whether the sister state decree is valid or invalid. The District Court determined in that case that plaintiff was bound by the Connecticut decree since plaintiff entered an appearance therein and is bound by the doctine of res judicata. It should be noted that in the Thompson case herein, David Thompson did not enter an appearance in Louisiana and is not bound by any Louisiana decree.

In *Rosenstiel v. Rosenstiel,* 278 F.Supp. 974 (USDC NY 1967), a wife sought an action seeking to restrain a Florida divorce decree in a New York District Court. In *Rosenstiel,* the Federal District Court indicated on Page 799 that:

> "Here, however, plaintiff, in effect, is seeking a declaration of her marital status under the Constitution of the United States ... and there is no reason why a declaratory action should not prima facie lie to determine the controverted status of the parties ... An action to determine the validity of a divorce decree is not technically a divorce action, although, in effect, it determines the marital relationship of the parties involved."
> (Citations not cited).

The Court took jurisdiction on the basis that there was diversity of citizenship and a "constitutional claim which is not frivolous" (P. 799).

Other Federal Courts have taken jurisdiction over domestic relations actions to determine the validity of sister state decrees and the like. See *Lloyd v. Loeffler,* 694 F.2d 489 (7th Cir. 1982).

The fact situation herein is similar to that in *Rosenstiel*. Here, Defendant, Susan Thompson, has obtained a sister state decree which conflicts with the California decree obtained by Plaintiff, David Thompson. The sister state decree is in confict with the relevant federal statute, 28 U.S.C. 1738A, and thus should be restrained and determined to be void.

This Court has jurisdiction pursuant to diversity of citizenship. It appears to be the rule that for a Federal Court to entertain jurisdiction in a "domestic relations matter" there must be diversity of citizenship or a federal law or statute involved. Here, Plaintiff has met all of the above requisites.

## IV. DEFENDANT'S CONTENTION THAT THIS COURT LACKS SUBJECT MATTER JURISDICTION LACKS MERIT.

Defendant contends on Pages 3-11 that this Court lacks subject matter jurisdiction.

Defendant relies chiefly on *Webb v. Webb*, (1981) 451 US 493. *Webb* is not in point. In *Webb*, the mother filed a certiorari petition in the United States Supreme Court which was rejected by the Supreme Court based on 28 U.S.C. 1257, which provides:

> "By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question, where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution . . ."

In *Webb*, the mother subjected her to the jurisdiction of both the state courts of Florida and Georgia and apparently failed to raise the issue of the validity of the court's jurisdiction. The Supreme Court thus denied her petition in that she did not establish a "record" in the inferior court.

In the case herein, Plaintiff Thompson did not subject himself to the jurisdiction of the Louisiana State Court; is



not bound by any principles of res judicata; and can collaterally attack such judgment. Accordingly, the *Webb* case is not in point.

Next, Defendant apparently argues that jurisdiction is not vested in any court of the State of California (P. 6). This contention lacks merit in that moving party, Susan Thompson, initiated the California State Court proceeding; the matter is still pending in California even though David has obtained a custody decree herein; the cited California statute, Civil Code Section 5150 et seq., provides that California has jurisdiction in that it was the "home state of the child at the time of commencement of the proceeding" and California has continuing jurisdiction over the custody matter in that it properly obtained jurisdiction pursuant to the petition filed by moving party, Susan Thompson. In the event that the cited "Uniform Child Custody Jurisdiction Act" is in conflict with 28 U.S.C. 1738A, obviously the state act is invalid. The federal statute specifically provides that if the custody matter is pending in California, the Louisiana decree is invalid. Hence, it appears that California has jurisdiction.

In any event, this Federal Court has jurisdiction over Defendant who resides in the United States and jurisdiction is asserted under diversity of citizenship.

## V. DEFENDANT'S ASSERTION THAT THIS COURT LACKS "IN PERSONAM" JURISDICTION OVER DEFENDANT LACKS MERIT.

Moving party argues on Page 11 that this Court lacks jurisdiction over Defendant based on lack of proper service.

Rule 4(e) provides that service can be pursuant to a statute or rule of court of the state in which the District Court is held. California Code of Civil Procedure 413.10 provides that a summons and complaint can be served outside that state by personal service. This Court's Local Rule 5(a)

provides that service in diversity cases shall be by personal service.

The Complaint herein was served by personal service which is permissible.

Next, moving party somehow asserts that she is outside the jurisdiction of this Federal Court because she is no longer in California, citing *Washington v. International Shoe*, 326 U.S. 310 (1945). The *International Shoe* case involved the validity of a state court decree and has no relevance to this Federal Court's jurisdiction. Furthermore, International Shoe has been partially overruled or "diluted" by cases that indicate that a state has jurisdiction if the out-of-state act has "effects" in the state. *McGee v. International Life*, (1958) 355 U.S. 220, 78 S.Ct. 199; *Travelers Health v. Virginia*, (1950) 339 U.S. 643, 70 S.Ct. 927.

In any event, the California State Court has jurisdiction over the parties in that moving party brought the California State Court proceeding which is still pending and this Federal Court certainly has jurisdiction over the person in that moving party resides within the United States.

## VI. THIS ACTION IS PROPERLY BROUGHT WITHIN THIS DISTRICT.

Defendant argues that this case should be transferred to the United States District Court of Louisiana.

28 U.S.C. 1391 provides in part as follows:

> "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the district court where all plaintiffs *or* all defendants reside, *or* in which the claim arose. (Emphasis added).
>
> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."



In making a motion for change of venue, the moving party, Defendant herein, has the burden of proof. *Kraft v. Hoskins*, (DC Va. 1970) 311 F.Supp. 1404; *United Rubber, et al. v. Lee Rubber*, (DC NJ 1967) 269 F.Supp. 708.

The purpose of the venue section is to provide a convenient from for trial balancing the equities and fairness of each party. *Weil v. New York State*, (DC NY 1975) 400 F.Supp. 1364; *Junior Spice v. Turbotville*, (DC PA 1972) 339 F.Supp. 1189; *Philadelpia Housing v. American Radiator*, (DC PA 1968) 291 F.Supp. 252. Thus venue is a question of convenience for the parties and should be treated in practical terms. *Penrod Drilling v. Johnson*, (CA Tex. 1969) 414 F.2d 1217.

Plaintiff's choice of forum should not be disturbed without some sound policy reason relating to convenience of parties or efficient judicial administration, and there is a strong judicial preference for allowing Plaintiff to choose his forum. *Warner Press v. Warner Books*, (DC Ind. 1973) 366 F.Supp. 187; *Denke v. Galveston*, (DC Tex. 1972) 353 F.Supp. 315.

The basis for jurisdiction herein is diversity of citizenship and hence venue is proper where Plaintiff resides. It should be noted that in *Rosenstiel* the New York District Court asserted jurisdiction even though the husband left New York for Florida and initiated a Florida State proceeding. The Court found jurisdiction based on diversity of citizenship.

The fact that there is a violation of a federal statute does not mean that this action is not based on diversity of citizenship in that violation of a federal statute is not itself the basis of jurisdiction. See *Winsor v. United Airlines, Inc.*, 159 F.Supp. 856 (DC Del. 1958); *Cowan v. U.S.*, 172 F.Supp. 291, (DC NY 1959); *Cogswell v. Board of Levee*, 142 F.2d 750; (CCA La. 1944). In this case, there is diversity of citizenship and a relevant federal statute. The

*Rosenstiel* case indicates that a New York Federal District Court had jurisdiction over a Florida citizen on the basis of diversity of citizenship where there was a federal question. The federal question itself does not give jurisdiction unless the statute itself gives a federal cause of action. Accordingly, it appears that jurisdiction is based on diversity of citizenship and this Court can retain venue over the matter.

Even if moving party demonstrates that this matter is not founded solely on diversity of citizenship in that the federal statute grants jurisdiction, it is apparent that the claim arose within this district and hence under 28 U.S.C. 1391(b) this action may be maintained here.

Accordingly, if this Court is convinced that the federal statute is a basis of a claim in Federal Court, it is apparent that moving party violated the federal statute in California by moving from California to Louisiana with the intent to violate the federal act by filing an action in Louisiana. Thus the acts had "intended effects" for persons in California and arose in California such that this Court can retain venue over this matter.

Additionally, this Court should not transfer the matter to a Louisiana Federal District Court in that (1) this matter is largely, if not solely, a matter which can be determined by Court without testimony or discovery, (2) both parties have retained counsel in this Court who are familiar with the legal issues involved and (3) moving party should not be benefited by a transfer where she fled California with the obvious intention of violating the federal statute and avoiding the legal consequences of the California State Court custody decree. Public policy demand that this Court retain venue in that if this Court transfers the matter to Louisiana, this Court would be encouraging persons to flee a state during a custody dispute; establish a residence in a foreign state and cause the opposing spouse the inconvenience of litigating the issue in the Federal District Court in that foreign state. Obviously, this would not be as intended by Congress in its enactment of the federal statute in that it



would not discourage litigating parties from leaving the state with the child who is the subject of the litigation.

Accordingly, it is respectfully submitted that this Court retain jurisdiction based on the above authorities; based on the inconvenience to Plaintiff from a transfer; and based on the equities between the parties.

Respectfully submitted,

Dated: February 22, 1984

/s/ Stuart W. Knight
STUART W. KNIGHT
Attorney for Plaintiff

RONALD W. WEISS
(Tustin address omitted)
STUART W. KNIGHT
(Tustin address omitted)
714/730-5261
Attorney for the Petitioner

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(TITLE OMITTED IN PRINTING)

CASE NO. CV 83-5221 AAH (Gx)
DECLARATION OF RONALD W. WEISS
IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS

Date: March 19, 1984 (Cont. from March 5, 1984)
Time: 10:00 A.M. Courtroom: 1

RONALD W. WEISS, counsel for Plaintiff herein, declares as follows:

1. He represents Plaintiff, David A. Thompson, in Los Angeles Superior Court Case No. D 964318, and has represented David A. Thompson in said case since 1979. Such litigation concerns a Dissolution of Marriage between David A. Thompson and Susan A. Thompson; property rights; support issues; and child custody issues.

2. Susan A. Thompson filed such action seeking custody of the minor child in the month of July 1978.

3. In the initial temporary custody hearing, on September 5, and 6, 1978, the court awarded temporary custody of the minor son Matthew, a male child age 1 year at the time born August 9, 1977, to Susan A. Thompson the Petitioner in the State Court matter subject to reasonable rights of visitation



being reserved to the Respondent in the State Court matter, David A. Thompson.

4. On September 19, 1979, September 20, 1979, October 10, 1979, October 12, 1979, a hearing was held in the Superior Court of the State of California for the County of Los Angeles, The Honorable Roberta Ralph, Judge Presiding, as a result of an action sought by David A. Thompson requesting that the court set forth specific visitation times and rights that he have with his minor son Matthew due to his allegation that the Petitioner Susan A. Thompson was willfully depriving him of visitation time with his minor child. After this hearing the Judge ordered Joint Legal Custody and very broad specific visitation rights.

5. On or about the month of November 1980, David A. Thompson once again filed an action with the Los Angeles Superior Court requesting custody of the minor child. The Petitioner in the State Court matter Susan A. Thompson then filed requesting that she be allowed to remove the minor child from the State of California to the State of Louisiana. The court stated as follows:

> "The court: You want custody of the boy, I will tell you what I will do. I will order a court investigation. You will pay for it, a court investigation takes four months. In the interim she will be permitted to go to Louisiana. You will get the visitations as proposed by Mr. Taback. (Mrs. Susan Thompson's lawyer in the State Court Action) After that, I will have the court investigator's report, and I will look at the Psychiatric Reports that preceded it. Do you want to do that?" (The aforementioned quote was directed to David A. Thompson).

A copy of the Transcript resulting from December 4, 1980, appearance is attached hereto for the court's review.

6. Thereafter, Susan A. Thompson left with Matthew to Louisiana and on or about March 24, 1981, some three months after leaving California, filed a petition seeking custody in Louisiana. A true copy of the pertinent parts of the petition is attached hereto as Exhibit "1". It would be noted that Susan represents in Paragraph 3 that she was "awarded the custody of the said minor child in the California Court proceeding." This appears to me to be a misrepresentation in that it was not clarified that such custody was on a temporary basis with the matter of custody still pending as a litigated issue in the California Court.

7. An investigation was conducted by the Probation Department of the County of Los Angeles and a report was submitted in April of 1981, which very clearly and strongly recommended that custody of the minor child be awarded to the father David A. Thompson. (This report is marked not for copying, but could be made available to the court if the court feels it is pertinent).

8. David Thompson did not appear in the Louisiana action and judgment in favour of Susan was obtained by default.

9. David has never entered an appearance in Louisiana and has not been subjected to the jurisdiction of that court.

10. Thereafter, on June 15, 1981, the court in accordance with the Probation Officer's Report and as a result of the Petitioner Susan A. Thompson refusing to return to the State of California, awarded custody of the minor child to David A. Thompson.

11. The latest court order for custody is in favour of David pursuant to the above California decree. The matter is still pending in the California Court.

12. Accordingly, there exists a situation that David A. Thompson has custody over Matthew in California and Susan A. Thompson has custody over Matthew in Louisiana.



13. It also appears to me that Susan A. Thompson obtained custody over Matthew in Louisiana pursuant to her misrepresentation to Court and the Louisiana custody award is in conflict with the Federal Statute 28 U.S.C. 1738(a), and thus the Louisiana custody award is void.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 22 day of February, 1984, at Tustin, California.

/s/ Ronald W. Weiss
RONALD W. WEISS

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FILED
MAR 12 1984
Clerk, U.S. District Court
Central District of California
Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(TITLE OMITTED IN PRINTING)

CASE NO. CV 83 5221 AAH (Gx)
REPLY MEMORANDUM TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COMPLAINT

Defendant, SUSAN A. THOMPSON, aka SUSAN A. CLAY now presents her reply to Plaintiff's Opposition to Defendant's Motion to Dismiss as follows:

I

Plaintiff contends that the Louisiana custody decree is invalid because it violates 28 U.S.C. Section 1738A in that the decree was awarded while the California state court custody action was still pending.

Plaintiff attaches a partial transcript from the December 4, 1980 hearing to support his contention that the court granted only temporary custody to defendant.

However, it is not apparent either from the partial transcript, or from the court's minute order attached to defendant's motion, that the court awarded only temporary custody to defendant.

The partial transcript appears to be dealing only with issues of visitation, and not custody. This is supported by the comments on page 4 wherein the Petitioner's attorney reminds the court that there is presently no custody issue before the court. It is further supported by the court's minute order which states that once petitioner moves to Louisiana, then custody shall be sole with her without prejudice. The rest of the order deals only with issues of visitation and communication. Nowhere does the minute order state that the order is only temporary.

II

Defendant has cited *Webb v. Webb,* (1981) 451 U.S. 493, 68 L.Ed. 392, 101 S.Ct. 1889 to establish that the state courts have jurisdiction over the subject matter herein, and to demonstrate that the federal courts do not have jurisdiction. Although the *Webb* case deals entirely with comity, and its application to child custody cases, plaintiff contends that *Webb* is not on point because the Supreme Court denied appellant's petition based on appellant's failure to establish a "record" in the inferior court. However, establishing a record in the state courts is exactly one of the reasons the present case must be heard in the state court. The court in Webb said, at pages 500 and 501,

> "There are also very practical reasons for insisting that federal issues be presented first in the state-court system. *The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue.* It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth. The rule also insures that if there are independent and adequate state grounds that



> would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most stances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our own workload, this is a very substantial matter."

Thus, it is evident that Webb is on point to show that the state courts, not the federal courts, must have jurisdiction in the present action.

III

Plaintiff contends that *Rosenthiel v. Rosenthiel,* 278 F.Supp.794 (1967) is directly on point in the present case. This contention is incorrect.

First, *Rosenthiel* deals with comity with respect to divorce actions, and not child custody actions. This is a substantial difference in that federal law has clearly separated the realm of child custody cases from divorce cases when it enacted 28 U.S.C. Section 1738A.

Second, plaintiff uses *Rosenthiel* to support his contention that federal courts have exercised jurisdiction over domestic relations to determine the validity of sister state decrees and the like. However, the court in *Rosenthiel* said, at page 796:

> "The federal district courts sitting in the several states have no jurisdiction over actions for divorce and alimony."

Third, plaintiff contends that in the present action, the California action was pending when defendant got her

Louisiana decree. In the *Rosenthiel* action, there was no action pending.

Thus, plaintiff cannot use *Rosenthiel* to prove any of his contentions.

IV

In plaintiff's Statement of Facts, plaintiff contends that defendant fled California to get a more favorable forum for a change of custody award. This is not true.

When the defendant left California on December 11, 1980, she was the sole custodian of the child, by virtue of the California decree. [A copy of which is attached to defendant's moving papers.]

The proceeding in Louisiana was not a suit for change of custody. Such a decree was not necessary, as defendant already had sole custody. The proceeding in Louisiana was an action for the filing of the California decree of December 4, 1980, and for a decree that it had the same effect and enforcement as if it had been awarded by the First Judicial District Court of Louisiana. A complete, true and correct copy of this Petition is attached herein as Exhibit "A".

The only modification requested in the petition is for a change of plaintiff's visitation privileges, based on the plaintiff's abuse of the child.

Accordingly, the proceeding in Louisiana was proper.

Accordingly, it is respectfully submitted that this Court does not have jurisdiction to hear the present case.

Respectfully submitted,

RUSTON & NANCE, INCORPORATED
DATED: March 12, 1984 By /s/ Nancy E. Zeltzer
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FILED
MAY 12 1984
Clerk U.S. District Court
Central District of California
/s/ AVM

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(TITLE OMITTED IN PRINTING)

CASE NO. CV 83-5221 AAH (Gx)
NOTICE OF APPEAL BY PLAINTIFF,
DAVID A. THOMPSON

NOTICE IS HEREBY GIVEN that Plaintiff, DAVID A. THOMPSON, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment and Order of Dismissal entered in the above action on April 10, 1984.

Plaintiff and Appellant shall be represented by Ronald W. Weiss and Stuart W. Knight, 13522 Newport Avenue, Suite 201, Tustin, California 92680; (714) 730-4808. Defendant and Appellee is represented by Ruston & Nance, Incorporated, 111 Fashion Lane, P.O. Box 2220, Tustin, California, 92681; (714) 832-2220.

Dated: Aprill 30, 1984

/s/ STUART W. KNIGHT
STUART W. KNIGHT
Attorney for Defendant/Appellant

# PETITIONER'S

# BRIEF

Supreme Court, U.S.
FILED
MAR 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-964

IN THE

# Supreme Court of the United States

October Term, 1986

**DAVID A. THOMPSON,**

*Petitioner,*

*vs.*

**SUSAN A. THOMPSON, aka, SUSAN A. CLAY,**

*Respondent.*

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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## BRIEF FOR THE PETITIONER

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**RONALD W. WEISS, ESQ.***
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*Attorney for Petitioner*
*Counsel of Record

PETITION FOR CERTIORARI FILED DECEMBER 8, 1986
CERTIORARI GRANTED JANUARY 27, 1987

## QUESTION PRESENTED

DOES THE PARENTAL KIDNAPPING PREVENTION ACT OF 1980, 28 U.S.C. §1738A (1982) FURNISH A PRIVATE CAUSE OF ACTION IN FEDERAL COURT TO DETERMINE WHICH OF TWO SISTER STATES ENTERING CONFLICTING CHILD CUSTODY DECREES SHOULD HAVE JURISDICTION OVER THE CHILD CUSTODY PROCEEDINGS?

## LIST OF PARTIES

The parties to the proceeding below were the Petitioner, DAVID A. THOMPSON, and the Respondent, SUSAN A. THOMPSON, aka, SUSAN A.CLAY.

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## OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 798 F.2d 1547. A copy of the Opinion as rendered by the Court is reprinted in the Appendix to the Petition for Writ of Certiorari [1] (PApp. A 1).

The Order of Dismissal of the United States District Court for the Central District of California (the Honorable A. Andrew Hauk, Senior Judge Presiding) has not been reported. It is reprinted in the Appendix to the Petition for Writ of Certiorari (PApp. A 39).

## JURISDICTION

Petitioner David A. Thompson (David) invoked subject matter jurisdiction under 28 U.S.C. §1738A (Parental Kidnapping Prevention Act of 1980 (hereinafter "PKPA," Section 1738A or the "Act")) and 28 U.S.C. §1331, invoking federal question jurisdiction. David sought declaratory and injunctive relief but did not cite 28 U.S.C. §§ 2201 and 2202 as specific authority.

Personal jurisdiction was obtained over Respondent Susan A. Thompson, aka, Susan A. Clay (hereinafter "Susan") when Susan purposefully availed herself of the protection and benefits of California by instituting the underlying action for dissolution of marriage and for child custody. David's action for enforcement of Section 1738A is directly related to Susan's original California custody action.

On David's appeal, the Ninth Circuit on September 10, 1986, entered a Judgment and opinion affirming the

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[1] In this Brief, the Petition for Writ of Certiorari will be cited as "P", the Appendix to the Petition for Writ of Certiorari as "PApp." and the Joint Appendix as "JA".

Central District's Order. No Petition for Rehearing or for Hearing En Banc was sought.

The jurisdiction of this Court to review the Judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

The text of 28 U.S.C. §1738A; 28 U.S.C. §§ 2201 and 2202 are reproduced at P3 through P6. Pertinent portions of the text of the Uniform Child Custody Jurisdiction Act (UCCJA) (found in California Civil Code §§ 5150-5174 and Louisiana at LSA-RS 13:1700-1724) are reprinted in the appendix to this brief.

## STATEMENT OF THE CASE

This case arises out of the entry of conflicting child custody decrees issued by California and Louisiana state courts.

In 1978 Susan commenced action in Los Angeles, California Superior Court seeking dissolution of her marriage to David and custody of their son Matthew (born August 9, 1977).

In September and October 1979 a multiday trial was had in the Los Angeles Superior Court regarding visitation, which was all David was seeking at that time (JA1). As a result of that hearing Susan was awarded physical custody, joint legal custody to both parties, and David was awarded ample and reasonable visitation. It should be noted that the allegations raised by Susan in her subsequent Louisiana Petition (JA23-JA30) were basically the very same issues which she alleged in this Los Angeles hearing as she attempted to deny David all visitation. After all testimony and evidence was presented, her allegations were found to be without merit.



In December 1980 Susan alleged she could find no work in the entire Southern California area as a pediatric neurologist and requested permission of the court to move to Louisiana with Matthew in order to accept employment at the LSU Medical School. The court granted her permission to leave and custody of Matthew without prejudice in order to prevent any problems with medical treatment, religion, or schooling (JA6, JA12).

It was clearly understood by all parties that California would retain jurisdiction over the child pending a Social Services investigation and future hearing to determine a final award of custody of Matthew which was scheduled for April 16, 1981 (JA6, JA51).

In December 1980 Susan moved to Louisiana and in February 1981 she utilized a minor incident at the Shreveport airport to initiate proceedings in Louisiana which ultimately resulted in the Caddo Parish Juvenile Court placing Matthew in its protective custody (JA15-JA22).

It was also during this time that the Los Angeles County Social Services Investigator Foran was conducting her investigation as ordered by the court. At some time during the investigation Foran let it be known that her recommendation to the court would be to order a change in custody of Matthew from Susan to David.

On March 24, 1981, Susan filed a Petition For Filing and Enforcing of Foreign Custody Decree, For Judgment of Custody, and For Modification of Visitation Privileges in the Caddo Parish First Judical District Court (JA23).

Prior to the Louisiana Court assuming jurisdiction of the case, the Los Angeles Superior Court Judge, the Honorable Harry T. Shaffer, telephonically talked to the Louisiana Court and informed him of California's desire and intention to retain jursidiction, pursuant to the

UCCJA and PKPA, over the matter. Judge Shaffer specifically rejected Louisiana's attempt to assert jurisdiction (JA51).

Having been made fully aware of California's desire to retain jurisdiction, Louisiana nonetheless assumed jurisdiction and appointed a curator ad hoc to represent and notify David of a hearing set for April 7, 1981 (JA40, JA41, JA41A). The curator ad hoc filed an "answer" to the Petition (JA45) and the Louisiana Court, in what must be characterized as an ex parte fashion, granted custody of Matthew to Susan (JA47).

Because the Louisiana Court had taken jurisdiction of this matter after being made fully aware that the California Court desired to retain jurisdiction, David did not specially appear in the Louisiana jurisdiction to conduct what would be an obviously fruitless and expensive contest of jurisdiction.

Meanwhile, after several continuances, the Los Angeles Court had a hearing and changed custody of Matthew to David (JA70).

Susan thereafter filed an appeal in the California Court of Appeal and followed that with a Petition for Writ of Mandate to the California Supreme Court. Her appeal was dismissed as abandoned in 1985 because she failed to timely file required documents.

In August 1983 David filed a complaint in the United States District Court, Central District of California, seeking a declaratory judgment, pursuant to the PKPA, that the Louisiana judgment was void and that all custody matters should be properly decided by California (JA73).

After personal service, Susan brought a Motion to Dismiss David's complaint on the basis that (1) the District Court lacked subject matter jurisdiction and (2) the



District Court lacked personal jurisdiction over Susan (JA81).

In March 1984 the District Court granted Susan's Motion. The Order dismissing the complaint was entered on April 10, 1984 (PApp.39).

On May 3, 1984 David filed a Notice of Appeal for that Order to the Ninth Circuit.

On September 10, 1986 the Ninth Circuit filed its opinion affirming the District Court's dismissal, not for lack of subject matter jurisdiction, but because David had failed to state a claim upon which federal relief could be granted (PApp.1). David filed no petition for rehearing or hearing en banc, but petitioned this Court for this Writ of Certiorari.

## SUMMARY OF ARGUMENT

Petitioner submits that the Ninth Circuit's holding in this matter, that private parties cannot state a cause of action to enforce PKPA provisions in federal court, is incorrect and stands alone in contrast to the other circuits which have considered the same issue.

While the provisions of the PKPA (28 U.S.C. §1738A) do not specifically grant a party a private right of action to enforce its provisions against a non-complying state, its does not deny that right.

Petitioner submits that the court should consider the PKPA provisions in the light of the four-part test enunciated in *Cort v. Ash*, 422 U.S. 66 (1974), to determine that a private right of action may be found. Without such a determination the obvious intent of Congress in its attempt to bring some order and sanity into the chaos of

conflicting states and warring parents will not be achieved.

In applying *Cort* to this matter, each of the parties hereto meets the definition of "contestants" as defined in the PKPA.

Secondly, Congress was aware of problems with compliance and enforcement of the UCCJA and enacted the PKPA to correct those problems by requiring the states and affected parties to comply to national standards. It is Petitioner's position that the remedies he has sought are consistent with that underlying purpose and should be allowed.

The analysis of the Third and Eleventh Circuits in *Flood v. Braaten,* 727 F.2d 303, and *McDougald v. Jenson,* 786 F.2d 1465, respectively, are more persuasive in their consideration of the intent of Congress and ways to implement it using remedies already available to the court. The Ninth Circuit's analysis, on the other hand, stands alone in determining that the domestic relations exception to diversity jurisdiction, as well as a misinterpretation of congressional hearings on similar non-enacted bills, would prevent a private party from enforcing the PKPA provision thereby allowing states to optionally comply with it and generally rendering the legislation nugatory.

While the area of domestic law and custody decrees is normally left by the federal courts to the expertise of the state courts and the Ninth Circuit believed that the domestic relations exception would further prevent the federal courts from allowing a private party the right to enforce the PKPA, Petitioner submits that the domestic relations exception has no application to a case predicated on a federal question and therefore does not apply to the PKPA. The federal courts are only being asked to



determine which of two states is in compliance with the PKPA; then that court only has to enjoin the offending state or party. That is the limit of federal involvement authorized and sought.

Even though the PKPA itself provides no enforcement remedies, Petitioner submits that the federal courts already have at their disposal sufficient remedies in the form of the Declaratory Relief Act (28 U.S.C. §§ 2201 and 2202) to render all relief requested. Utilization of these provisions will eventually decrease the occurrence of child-snatching and forum shopping currently encouraged by the holding of the Ninth Circuit. A reversal of the opinion below will produce the results sought by Congress in enacting this important legislation.

Lastly, while it would normally be a requirement, pursuant to *Webb v. Webb,* 451 U.S. 493 (1981), that David have appeared in Louisiana to contest jurisdiction or to present his full faith and credit claim, in this particular case that should not be required because it had become obvious that such an appearance would have been futile and needlessly expensive. The California Judge had talked to the Louisiana Judge as required by the UCCJA and stated a desire of California to continue to retain jurisdiction of the child because of ongoing investigations and scheduled custody hearings. Louisiana disregarded California's request and took jurisdiction in spite of the Judge's protest. David could have fared no better. Accordingly, he sought aid in the next available court, the federal court.

## ARGUMENT

### I.

### AN APPLICATION OF THE FOUR-PART TEST ENUNCIATED IN *CORT v. ASH* WOULD ALLOW THE IMPLICATION OF A PRIVATE RIGHT OF ACTION TO ENFORCE THE PKPA PROVISIONS WHERE THE PKPA DOES NOT PROHIBIT A PRIVATE RIGHT AND THE LEGISLATIVE HISTORY DOES NOT INDICATE ANY INTENT TO DENY SUCH ACTION.

Traditionally this Court has used a four-part test, as set forth in *Cort v. Ash*, 422 U.S. 66, 78 (1974), to determine if a private right of action could be construed for any questioned statute.

That test required the courts to determine:

(1) Is the petitioner one of the class for whose special benefit the statute was enacted?

(2) Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?

(3) Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the petitioner?

(4) It the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?

If the *Cort* test is utilized in this action, it becomes apparent that a private cause of action can properly be implied.



There can be no argument that the parties hereto and the child Matthew meet the Act's definition of "contestants" and "child" as defined at Section 1738A (b)(1) and (b)(2) and they, therefore, fall into the class for whose benefit the statute was enacted.

Secondly, the statutory provisions of the PKPA clearly provide no specific authority which would allow a private cause of action. However, each year throughout its history Congress has passed legislation which was designed to correct some perceived national problem. Some of this legislation is enacted with enforcement provisions and some is not.

This Court has recognized private rights of action in silent statutes where "the statute in question at least prohibited certain conduct or created federal rights in favor of private parties." (*See Touche Ross & Co. v. Redington*, 442 U.S. 560 (1974), and the cases cited therein at page 569.)

An examination of this Act's legislative history includes: (1) several bills introduced by Representative Fish that would have modified the domestic relations exception to diversity jurisdiction to allow federal courts to be courts of first instance for the enforcement of child custody decrees; (2) a colloquy between Representatives Conyers and Fish concerning those bills; and (3) a written submission [2] by the Justice Department that, *inter alia*, opposed those bills and a similar bill introduced by Representative Dornan.

The Third Circuit, in *Flood v. Braaten*, 727 F.2d at 310-312, concluded from an examination of the Fish bills that Congress had simply rejected the idea of federal

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[2] *See* Letter from Patricia M. Wald, Assistant Attorney General, to Representative Peter M. Rodino, Chairman of the House Judiciary Comm., *reprinted in* Addendem to Joint Hearing at 110; H.R. 11722, 95th Cong., 2d Sess. (1978) (Dornan); H.R. 11273, 95th Cong., 2d Sess. (1978) (Fish); H.R. 9913, 95th Cong., 1st Sess. (1977) (Fish).

courts being courts of first instance to determine which parent should be awarded custody and remained silent on the question of whether access to the federal courts should be available if two states asserted conflicting jurisdiction or a second state refused to enforce the decree of the first. The Ninth Circuit read the legislative history much more broadly to conclude that Congress meant for there to be no federal role whatsoever (other that Section 1257 review by the Supreme Court) in the enforcement of the PKPA, *see Thompson*, (PApp. 14-23).

Petitioner submits that the Third Circuit's conclusion is more soundly based in the legislative history for several reasons. First, the Ninth Circuit fails to recognize that the Fish bills intended to make federal courts into courts of first instance in child custody disputes. If the Conyers-Fish colloquy and Justice Department submission are viewed against this backdrop, those statements are much more consistent with the Third Circuit's reading of congressional intent, to the extent that any intent can be derived from that portion of the legislative history.[3] Secondly, the Ninth Circuit fails to point out that the Conyers-Fish colloquy is an isolated exchange that is not followed by any action evidencing the intent of the committee as a whole since no vote or other committee action was taken on the Fish bills. *See House Legislative Calendar, Comm. on Judiciary*, H.R. 1290, 96th Cong., 2d Sess. 76 (1980), reprinted in *Cong. Index* (CCH)

[3] The Ninth Circuit places too much emphasis on the Justice Department letter as evidence of congressional intent for several additional reasons: (1) the letter was submitted on September 20, 1978, over two years before the PKPA was passed; (2) contrary to the Ninth Circuit's assertion, the letter's suggestions were not followed uniformly by Congress, as witnessed by the adoption of criminal sanctions over the advice given in the letter; and (3) the letter is silent on the modifications Congress eventually made to the UCCJA to eliminate jurisdictional gaps and therefore does not adequately address the question whether the PKPA, as ultimately adopted, was more than just a "specialized full faith and credit" statute.



34,502 (1981). Finally, in no way can the Fish bills be characterized as earlier versions of the Wallop proposal that ultimately became the PKPA. Consequently, Congress' failure to adopt them says very little about whether it viewed or would view a limited federal court role in the context of a "virtual impasse between the courts of two states" to be appropriate under the bill that was ultimately enacted into law.

The Eleventh Circuit, in its able and exhaustive analysis of the PKPA in *McDougald v. Jenson*, 786 F.2d 1465, 1476, also determined that there could "be little doubt that Congress contemplated that one parent would be permitted to enforce compliance with the dictates of the PKPA . . . in a private action against the other parent."

Petitioner submits that *Flood, McDougald* and their progeny have correctly concluded that Congress must have intended a role for the federal judiciary and that the Ninth Circuit's opinion, which has been considered and rejected in all subsequent cases in jurisdictions beyond the Ninth Circuit, is incorrect (*see*, for example, *Olmo v. Olmo*, 646 F.Supp. 233 (E.D.N.Y. 1986)).

Of the federal circuit courts, only the Ninth Circuit in this case has specifically determined that the PKPA does not permit access to the federal courts for resolution of conflicting state court custody orders. The District of Columbia Circuit in *Bennett v. Bennett*, 682 F.2d 1039 (1982), and the Seventh Circuit in *Lloyd v. Loeffler*, 694 F.2d 489 (1982), are sometimes used to support arguments that federal courts cannot decide PKPA interstate jurisdictional conflicts. However, the *Bennett* Court and the *Lloyd* Court were primarily concerned with tort actions based upon parental kidnappings. The question of whether the PKPA is a basis for access to federal courts to resolve two conflicting state court custody decrees was not before either Court.

Congress, in enacting the PKPA, adopted and modified the jurisdictional requirements of the UCCJA and thereby created new federal standards for custody jurisdiction. It would be anomalous for Congress to have done this and then left enforcement of these standards entirely to the discretion of the states, particularly since the purpose of the PKPA was to avoid the unauthorized exercise of jurisdiction by any state (a problem which the states, acting on their own, appeared powerless to resolve).

In enacting the PKPA, Congress was aware of the rapidly increasing incidence of parental kidnapping—so-called "self-help." At that time it was estimated that between 25,000 and 100,000 children were the victims of interstate abduction each year. *Parental Kidnapping Prevention Act of 1978: Joint Hearing on S. 105 Before the Subcomm. on Criminal Justice of the Sen. Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Sen. Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 48 (1980).

It is nonsensical to assume that Congress would have taken such extraordinary substantive steps at the federal level to cure the fundamental problems of conflicting assertions of jurisdiction by state courts and frequent acts of self-help and also have committed the task of enforcement solely to the very courts which had created the problem in the first place. Yet, the Ninth Circuit's opinion would allow just such a result.

Moreover, the only option Congress could have considered, other than federal district court review, would have been review by the United States Supreme Court pursuant to 28 U.S.C. §1257, after the case had wound its way through the state court systems. Both the crowded



docket of the Supreme Court and the heightened need in the child custody context for speedy resolution of jurisdictional conflicts would render this option, for all practical purposes, the equivalent of denying the parties a forum to remedy transgressions of the PKPA. *See Flood*, 727 F.2d at 311-312.[4] It is therefore difficult to conclude that Congress would have intended such a harsh result without itself having expressly considered the question, particularly in view of the fact that the cause of action necessary to remedy the problem is narrowly circumscribed. For these reasons, Petitioner submits that a federal cause of action focussing on jurisdictional and interstate enforceability issues and triggered only by a virtual impasse between the courts of two states is consistent with the underlying legislative scheme of the PKPA.[5]

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[4] The dissent in *Merrell Dow* also discusses the inadequacy of section 1257 review as an option in this context. *Merrell Dow*, 106 S.Ct. at 3242-43 n.6.

[5] Recognition of such a cause of action would not fail under the fourth inquiry set forth in *Cort v. Ash* — that is, whether the cause of action would inappropriately encroach on an area traditionally relegated to state law. *See supra* note 14. As Judge Edwards noted in *Bennett v. Bennett*, it is decidedly within the competence of the federal courts to "occasionally have to decide which of two conflicting state decrees is valid." 682 F.2d at 1045 (Edwards, J., dissenting in part). Judge Edwards also acknowledged that such a suit "does not require a federal court to inquire into the present best interests of minor children." *Id.* On the contrary, "a federal court could in certain cases enforce a decree without becoming enmeshed in the underlying custody dispute." *Flood*, 727 F.2d at 310.

The Ninth Circuit's fear that a federal court could inevitably be drawn into the merits of the underlying dispute when the PKPA's emergency jurisdiction clause is implicated is unwarranted. *See Thompson*, PApp. 25. The Ninth Circuit ignored the fact that the emergency clause authorizes only interim custody awards, leaving the basic jurisdictional dispute to be resolved under the "home state" and "substantial connections" provisions.

## II.

## THE DOMESTIC RELATIONS EXCEPTION TO DIVERSITY JURISDICTION HAS NO APPLICATION TO CASES ARISING UNDER THE PKPA.

The Ninth Circuit erroneously believes that "the PKPA must be interpreted in light of the strong policies reflected in the domestic relations exception to diversity jurisdiction . . ." and that "federal courts must decline jurisdiction of cases concerning domestic relations when the primary issue concerns the status of parent and child or husband and wife" (PApp. A 24).

The domestic relations exception to diversity jurisdiction has no bearing on or relationship to the enforcement of a valid state custody decree through the use of declaratory relief and injunctive relief. As was discussed in *Flood*, 727 F.2d at 310, the federal courts are only being asked to ascertain which of two competing state custody awards is paramount under federal (PKPA) and state (UCCJA) law.

The domestic relations exception has no application to any action predicated on a federal question and does not apply to the PKPA.



## III.

## EXISTING REMEDIES CAN BE UTILIZED BY THE FEDERAL COURTS TO ENFORCE STATE COMPLIANCE WITH THE PKPA.

Once a federal cause of action is found to exist, "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose," *Cort v. Ash,* 422 U.S. 82, 84. To that end this Court must consider the remedies available to carry out an underlying purpose of the PKPA, which is to "facilitate the enforcement of custody and visitation decrees of sister States" (Pub. Law 96-611, section 7(c)(3)).

Throughout the history of this case there has been repeated denial of visitation, numerous mutual threats, and some violence involving such incidents as the maternal grandmother lying in wait at David's house and firing several shots at him, and David's attempt, with the aid of private investigators, to physically snatch Matthew from Louisiana and return him to the jurisdiction of the California courts.

These incidents are not brought to the Court's attention to gain sympathy for either party, but to stress to the Court the importance of resolving this issue so that further violence in this case and in thousands of other similar cases may be avoided. Petitioner respectfully submits that this case is only unique in that both parties are neurologists, but otherwise this scenario is being played out on a daily basis throughout the United States.

In this case enormous sums have been expended in legal disputes; normally, one party surrenders under the crush of the financial and emotional burden imposed by the legal system. That party may then resort to self-help or

may eventually lose all contact with his/her child(ren). In the long run society also shares in each such loss as it is forced to provide greater support to single parent families and counseling services to children and young adults who eventually discover that there was another loving parent out there who wasn't dead or otherwise unfit and who wanted them. Petitioner respectfully submits that much of this needless tragedy can be avoided by utilizing existing remedies to enforce the PKPA.

It has been held that a federal court with jurisdiction over a case is presumed to have at its disposal all of its preexisting remedial powers unless Congress has clearly stated that those powers should not be exercised. *See*, for example, *In re Letourneau*, 559 F.2d 892, 894 (2d Cir. 1977) ("When a congressional intent is unclear . . . no diminution in the remedial powers of the federal courts may be inferred. Congress must speak clearly to interfere with the historic equitable powers of the courts it has created."); *see also Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). As previously discussed, Congress, in enacting the PKPA, did not clearly state that the federal courts should not exercise their remedial powers if PKPA cases are properly before them under federal question jurisdiction. Thus, there is no impediment to any federal court exercising its preexisting remedial powers to enforce PKPA compliance.

The court's authority to issue the declaratory judgment sought by David in his complaint in the District Court is founded on the Declaratory Judgment Act, 28 U.S.C. §2201 (1982). The Eleventh Circuit fully analyzed this question in *McDougald*, 786 F.2d at 1480-81.

The *McDougald* court did not address the issue of injunctive relief because it was not properly before the Court. *See McDougald*, 786 F.2d at 1480. However, Justice Alarcon, in his dissent in *Thompson* expressed his



belief that a "district court may exercise its jurisdiction under section 1738A to enforce compliance with the PKPA's provisions through declaratory relief and narrowly circumscribed injunctive relief" (PApp. A 38).

Petitioner submits that the *McDougald* analysis and the analysis by Justice Alarcon indicate the appropriateness of the use of injunctive relief. The source of the authority for injunctive relief is found in the District Court's inherent equitable powers and at 28 U.S.C. §2202. (*See, e.g., Collum v. Edwards*, 578 F.2d 110, 112 (5th Cir. 1978); *Ramsburg v. American Investment Co.*, 231 F.2d 333, 336 (7th Cir. 1956); the All Writs Act, 28 U.S.C. §1651 (1982); and *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631, 637 (5th Cir.), *cert. denied*, 404 U.S. 941 (1971).

Further, as Justice Alarcon noted in his dissent in this matter (PApp. A 34), to adhere to the Ninth Circuit's construction would "so restrict the enforceability of the rights created by Section 1738A . . . as to deny a meaningful remedy to litigants. . . ." thereby rendering this legislation "a toothless declaration of unenforceable platitudes."

Petitioner submits that the federal courts' restricted role in PKPA matters is to correct an error of a state court which is violating the Act by asserting jurisdiction or by refusing to enforce another state's custody decree. This can be accomplished by the application of 28 U.S.C. §§ 2201 and 2202 and *minimal* federal involvement.

Petitioner submits that if this Court finds that a private right to enforce the PKPA exists, then, in the long run, child snatching and fleeing to another state will decrease. The fear of the wrath of a federal judge whose injunction has been disobeyed and the punishment he can impose is

far greater than the fear of some state judge who can be avoided merely by becoming unavailable in his jurisdiction.

## IV.

## PETITIONER SHOULD NOT BE REQUIRED TO APPEAR IN LOUISIANA TO PRESENT HIS FULL FAITH AND CREDIT CLAIM OR TO CONTEST JURISDICTION, WHEN TO DO SO WOULD BE FUTILE AND FORCE PETITIONER TO INCUR NEEDLESS EXPENSE.

Susan has urged in her opposition to the Petition For Writ of Certiorari that David should have appeared in the Louisiana Court to present his full faith and credit claim or to contest Louisiana jurisdiction. She cited *Webb v. Webb*, 451 U.S. 493 (1981), as controlling authority. That case held that a federal claim must be adequately presented in the state system or the Supreme Court would be without jurisdiction to review the matter. That matter apparently did not consider the Parental Kidnapping Prevention Act at all and therefore should not be controlling here.

David submits that it would have been futile for him to have appeared in Louisiana. The Los Angeles Superior Court Judge had telephonically communicated with the Louisiana Court and, as indicated at JA 51, refused to relinquish jurisdiction because of the pending investigation and the upcoming hearing. Louisiana nonetheless took jurisidiction based on the same allegations which the Los Angeles Court had determined were meritless.

Each party knew when Susan moved to Louisiana that hearings were scheduled and investigations were



underway. Each party agreed to appear in California. David believes that Susan only sought refuge in Louisiana when Investigator Foran let it be known that she would recommend a change in custody from Susan to David. Susan even went so far as to file an appeal in the California Court of Appeal.

The Louisiana Court took jurisdiction over Matthew at a time when Matthew had not yet been within the state for six months, and did so over the protests of the California Judge. To urge that David should have incurred expenses and expended time and energy to appear in Louisiana solely to oppose that assumption of jurisdiction flies in the face of common sense. David would have been, as noted by Judge Shaffer, entering "hostile territory" and would have had no chance of success.

Further, if David had gone to Louisiana and won, there was nothing to prevent Susan from snatching Matthew and fleeing to another state to begin the allegations and legal process all over again. Only the action of the federal court enjoining the assumption of jurisdiction over Matthew by any other state could have prevented this. Petitioner submits that it is this type of activity which Congress believed it was preventing when it enacted the PKPA. It is now up to this Court to agree by reversing the holding of the Ninth Circuit.

## CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit, insofar as it affirmed the dismissal of the complaint against the Respondent and held that Petitioner could not state a private cause of action in federal court to enforce the PKPA provisions, should be reversed.

Respectfully submitted,

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# APPENDIX

# APPENDIX

The provisions of the Uniform Child Custody Jurisdiction Act are found in California Civil Code Sections 5150 through 5174. Pertinent sections are set forth hereinbelow:

**Section 5150.**

(1) The general purposes of this title are to:

(a) Avoid jurisdiction competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being.

(b) Promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child.

(c) Assure that litigation concerning the custody of a child takes place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that the courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state.

(d) Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child.

(e) Deter abductions and other unilateral removals of children undertaken to obtain custody awards.

(f) Avoid relitigation of custody decisions of other states in this state insofar as feasible.

(g) Facilitate the enforcement of custody decrees of other states.

(h) Promote and expand the exchange of information and other forms of mutual assistance between the courts of

this state and those of other states concerned with the same child.

(i) To make uniform the law of those states which enact it.

**Section 5152.**

(1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if the conditions as set forth in any of the following paragraphs are met:

(a) This state (i) is the home state of the child at the time of the commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state.

(b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

(c) The child is physically present in this state and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent.

(d) (i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (a), (b), (c), or another state has declined to exercise jurisdiction on the ground that this state is the



more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

(2) Except under paragraphs (c) and (d) of subdivision (1), physical presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

(3) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

**Section 5155.**

(1) A court of this state shall not exercise its jurisdiction under this title if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this title, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons.

(2) Before hearing the petition in a custody proceeding the court shall examine the pleadings and other information supplied by the parties under Section 5159 and shall consult the child custody registry established under Section 5165 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state.

(3) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the

more appropriate forum and that information be exchanged in accordance with Sections 5168 through 5171. If a court of this state has made a custody decree before being informed of a pending proceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum.

**Section 5156.**

(1) A court which has jurisdiction under this title to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(2) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or guardian *ad litem* or other representative of the child.

(3) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(a) If another state is or recently was the child's home state.

(b) If another state has a closer connection with the child and his family or with the child and one or more of the contestants.

(c) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state.

(d) If the parties have agreed on another forum which is no less appropriate.



(e) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in Section 5150.

(4) Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

# RESPONDENT'S

# BRIEF

Supreme Court, U.S.
FILED
APR 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-964

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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DAVID A. THOMPSON,

*Petitioner,*

versus

SUSAN A. THOMPSON, aka, SUSAN A. CLAY

*Respondent.*

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**On Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit**

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## BRIEF FOR THE RESPONDENT

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## QUESTION PRESENTED FOR REVIEW

Does the Parental Kidnapping Prevention Act of 1980, Pub. L. 96-611, §6-10, (PKPA) create a private federal cause of action and jurisdiction in a federal district court for the enforcement of 28 U.S.C. §1738A?

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## STATEMENT OF THE CASE

1. On January 18, 1978, Dr. Clay filed a Petition for Dissolution of Marriage in the California court and for custody of her minor child, Matthew, born August 9, 1977. (JA1)

2. In a series of hearings, Dr. Clay was granted sole custody. (JA1)

3. On December 20, 1979, Dr. Clay and Dr. Thompson were granted joint legal custody of Matthew, with physical custody remaining with Dr. Clay. (JA1)

4. On November 17, 1980, Dr. Clay filed a Motion for Court Permission to move to the State of Louisiana in order to accept employment as head of the Child Neurology Division of Louisiana State University School of Medicine.

5. On December 4, 1980, after a hearing, the court entered the following judgment:

   "Present order of custody remains in effect until petitioner moves to Louisiana; *then custody shall be sole with her without prejudice.*" (emphasis added)

   The order also provides for visitation during the last week of each month by Dr. Thompson and provides for transportation costs, phone calls, and other visitation matters. (JA11,31)

6. Pursuant to the grant of the court's permission and its awarding her sole custody

of Matthew, Dr. Clay moved to Louisiana on December 11, 1980 to accept her new employment.

7. On January 25, 1981, an incident occurred in the City of Shreveport, Louisiana, at the Greater Shreveport Regional Airport involving Dr. Thompson and his son, Matthew, witnessed by a police officer.

8. The Juvenile Court of Caddo Parish, Louisiana, took protective custody of Matthew on February 20, 1981. Matthew remains under a protective custody order issued by that court. (JA15-22)

9. On March 24, 1981, Dr. Clay filed in the First Judicial District Court of Caddo Parish, Louisiana a Petition for Filing and Enforcing of Foreign Custody Decree, for Judgment of Custody, and for Modification of Visitation Privileges. (JA23)

10. Dr. Thompson received proper notice of this proceeding (JA38-41A); was represented therein by a court-appointed attorney (JA37,44), but made no personal appearance. The court was informed of the California proceedings pursuant to LSA-R.S. 13:1708 (JA35). Testimony was adduced from Dr. Clay, a psychiatrist, a neurologist, and the police officer witness.

11. In this Louisiana suit, Dr. Clay did not seek a change of the California custody order of December 4, 1980, but its enforcement, asking that it "be filed in the



office of the Clerk of this Honorable Court under the provisions of LSA-R.S. 13:1714(A), (R Opposition Brief App. 1a, a portion of Louisiana's Uniform Enforcement of Custody Act, LSA-R.S. 13:1700 et seq), and that same be decreed to have the same effect and shall be enforced in like manner as the custody decree granted by this Honorable Court" (JA29). The Louisiana court ordered that the December 4, 1980 California decree be filed pursuant to LSA-R.S. 13:1714(A) and ordered that "it be decreed to have the same effect and shall be enforced in like manner as a custody decree rendered by this Honorable Court" (JA44).

12. The only modification of the December 4, 1980 California custody order sought by Dr. Clay and rendered in the Louisiana proceedings was the placing of temporary restrictions and conditions on Dr. Thompson's visitation rights with Matthew, because of allegations and testimony of abuse of Matthew by Dr. Thompson (JA29). Visitation was suspended for 3 months; restrictions were placed on visitation for the next 3 months and until modified by the Court, the Court retaining jurisdiction "to increase, decrease, terminate, otherwise modify the visitation privileges of the defendant (Dr. Thompson) upon the application of either plaintiff (Dr. Clay) or defendant (Dr. Thompson)." A judgment containing

these provisions was rendered April 7, 1981 (JA47).

13. Dr. Thompson has never applied for any modification of these visitation privileges in the Louisiana court, but has relied upon the self-help described in Item 15 of Respondent's Statement of Facts, on page 11 in Applicant's Petition for Writ of Certiorari, and on page 15 of Petitioner's Brief.

14. On June 15, 1981, more than six (6) months after Dr. Clay and Matthew permanently left California and became residents of Louisiana on December 11, 1980, the California court granted sole custody to Dr. Thompson, without visitation privileges to Susan except on approval of the court (JA51-72, at 70).

15. On September 13, 1981, Dr. Thompson and an armed accomplice attempted unsuccessfully to kidnap Matthew from Dr. Clay's home in Shreveport (the self-help involving "private investigators or even force and violence" endangering "not only the parents and innocent children but also innocent bystanders and responding law enforcement personnel" referred to by Dr. Thompson on page 11 of his Petition for Writ of Certiorari), in an admitted attempt "to physically snatch Matthew from Louisiana and return him to the jurisdiction of the California courts" (Petitioner's Brief, p.12).



16. Dr. Thompson has never attempted to enforce the June 15, 1981 California judgment in a Louisiana Court, nor sought modification of the Louisiana decree of April 7, 1981.

17. On August 12, 1983, the present Complaint for Declaratory Relief and for Injunction Against Enforcement of Louisiana Order was filed by Dr. Thompson in the United States District Court of the Central District of California. (JA73)

18. The district court granted Dr. Clay's motion to dismiss the complaint for lack of subject matter and personal jurisdiction.

19. Doctor Thompson appealed to the Court of Appeals for the Ninth Circuit. Pursuant to that Court's request, the Department of Justice filed a brief as Amicus Curiae, supporting the position of Respondent. The Ninth Circuit affirmed the dismissal of Doctor Thompson's Complaint. This Court granted Certiorari January 27, 1987.

## SUMMARY OF ARGUMENT

1.

In determining whether Congress implicitly intended to create a private cause or right of action, or remedy, in enacting a statute that does not expressly provide for one, the issue is one of Congressional intent to create a private remedy as a

supplement to the express enforcement provisions of the statute.

2.

In determining Congressional intent, the relevant inquiries are Congress' perception of the law that it was shaping or reshaping, the problem that Congress perceived was not being adequately addressed by that law, the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, the likelihood that Congress intended to supercede or to supplement existing remedies, and whether implication of a federal cause of action is required to accomplish Congress' purpose in enacting the statute.

3.

In construing such Congressional intent, there is a necessary assumption that Congress did not intend to create a federal private cause of action, and the federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide.

4.

A review of all of the factors in Paragraph 2 above reveals clearly that Congress did not intend to create a federal cause of action when enacting PKPA. In fact, it expressly declined to do so when presented with the proposal to confer on federal district courts civil jurisdiction to enforce State custody orders.

5.

In PKPA, Congress imposed upon the States the federal full faith and credit duty of 28 U.S.C. 1738A,



limiting the federal involvement and remedy to the use of the Federal Parent Locator Service and the application of 18 U.S.C. 1073 to facilitate the location and state prosecution of parents who kidnap their children in violation of a state custody order entered pursuant to the jurisdictional requirements of 28 U.S.C. 1738A.

6.

In an era of increasing Congressional enactments, each of which creates or addresses a federal right, the effect upon the federal court system of the concomitant implication of a federal right of action is an important factor in determining Congressional intent. Implication of a federal cause or right of action in PKPA will flood the federal court system with custody disputes, which that system is not equipped to handle. In many cases, it would require the federal courts to become enmeshed in the underlying custody dispute. It would unnecessarily add to the burdensome caseload of federal courts.

7.

Implication of a federal cause or right of action is not required to accomplish Congress' purpose in enacting PKPA. The federal full faith and credit duty has been imposed upon the States. No showing has been made that State courts will fail to perform their constitutional duty and not comply with this federal mandate.

8.

There is no factual basis for concluding that state custody disputes can be handled more expeditiously

in the federal court system than through state court systems.

9.

Requiring a litigant to attempt to enforce his custody award in a state court prior to a federal review serves important purposes outlined by this Court in *Webb v. Webb*, 451 U.S. 493 (1981).

## ARGUMENT

### Statutory and Jurisprudential Background of PKPA

> In determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on that issue, the initial focus must be on the state of the law at the time the legislation was enacted. More precisely, we must examine Congress' perception of the law that it was shaping or reshaping. When Congress enacts new legislation, the question is whether Congress intended to create a private remedy as a supplement to the express enforcement provisions of the statute.
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> *Merrill Lynch, Pierce, Fenner & Smith v. Curron*, 456 U.S. 353, 378 (1982). See, also, *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. ___, 106 S. Ct. 3229, 3234-5, ftn. 9 (1986) and cases cited therein.

For over a hundred years prior to the enactment of 28 U.S.C. §1738A, the Parental Kidnapping Prevention Act of 1980 (PKPA), this Court and federal courts of appeal had uniformly held that the full faith and credit clause of the federal Constitution, Article



IV, §1, and its implementing statute, 28 U.S.C. §1738, did not create an independent basis of jurisdiction in a federal court, as a case arising under the Constitution, laws, or treaties of the United States, 28 U.S.C. §1331(a), but simply "prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a state other than that in which the court is sitting." *Minnesota v. Northern Securities Co.* 194 U.S. 48, 72 (1904); *Wisconsin v. Pelican Insurance Co.*, 127 U.S. 265, 291-292 (1888); *People of State of California ex rel McColgan v. Bruce*, 129 F. 2d 421, 424 (9th Cir. 1942) cert. denied 317 U.S. 678 (1942); *Clifford v. Williams*, 131 F. 100, 105 (C.C.D. Wash. 1904); *Hazen Research, Inc. v. Omega Minerals, Inc.*, 497 F. 2d 151, 153 (5th Cir. 1974); 13B Wright, Miller & Cooper, *Federal Practice and Procedure*, §3563 at 50. Were it otherwise, "any attempt, at any time or place, by any person, to enforce the provisions of any state statute or judgment would be, without more, a subject of federal jurisdiction," *People v. Bruce*, supra, 424.

The courts uniformly rejected these attempts to use 28 U.S.C. §1738 as the basis for jurisdiction in a federal court, as correctly noted in the majority Opinion below.

Federal courts are courts of limited jurisdiction, *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinea*, 456 U.S. 694 (1982), *Chase Manhatten Bank (National Association) v. South Acres Development Company, A Partnership*, 434 U.S. 236 (1978), *Owen Equipment and Erection Company v.*

*Geraldine Kroger*, 437 U.S. 365 (1978), *Monica Aldinger v. Merton L. Howard*, 427 U.S. 1 (1976), *Amell v. United States*, 384 U.S. 158 (1966).

"Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which (a federal) statute has defined," *Healy v. Ratta*, 292 U.S. 263, 270 (1934), *Victory Carriers, Inc. v. Bill Law*, 404 U.S. 202 (1971), reh den 404 U.S. 1064 (1972).

". . . whatever may the ambiguities of the phrase, 'arising under (the constitution, treaties, and laws of the United States)'—it does not embrace all civil cases that may present questions of federal law," *Guam v. Olsen* 431 U.S. 195, 202 (1977), *Chase Manhatten Bank (National Association) v. South Acres Development Company, a Partnership*, supra. See, also, *Gully v. First National Bank in Meridian* 299 U.S. 109 (1936) and *Crane v. Cedar Rapides and Iowa City Ry.Co.*, 395 U.S. 164 (1969).

". . . the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction," *Merrell Dow*, supra, 3235.

Both in diversity cases and federal question cases, federal courts have uniformly declined to hear disputes that would involve them in adjudicating domestic matters.

"[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States, and not to the laws of the United States." *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930), quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890).



In keeping with this principle, "federal courts must decline jurisdiction of cases concerning domestic relations when the primary issue concerns the status of parent and child or husband and wife." *Buechold v. Ortiz*, 401 F. 2d 371, 372 (9th Cir. 1968); *see also Csibi v. Fustos*, 670 F. 2d 134, 137-38 (9th Cir. 1982). Even when a federal question is presented, federal courts decline to hear disputes which would deeply involve them in adjudicating domestic matters. *See, e.g., Firestone v. Cleveland Trust Co.*, 654 F. 2d 1212, 1215 (6th Cir. 1981); *Bergstrom v. Bergstrom*, 623 F. 2d 517, 520 (8th Cir. 1980); *Huynh Thi Ahn v. Levi*, 586 F. 2d 625, 632-34 (6th Cir. 1978); *Hernstadt v. Hernstadt*, 373 F. 2d 316, 318 (2nd Cir. 1967). The legislative history of PKPA reveals clearly that Congress did not intend to change this.

Article IV, Section 1 of the Constitution and 28 U.S.C. §1738 command that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. A child custody order, however, is generally subject to modification where changed circumstances warrant a different custody arrangement. Consequently, since these orders are subject to modification, a court deciding a custody issue is not bound, as a federal constitutional or statutory requirement, to give full faith and credit to a custody decree entered by the court of another state. *Halvey v. Halvey* 330 U.S. 610 (1947), *Kovacs v. Brewer*, 356 U.S. 604 (1958), *Ford v. Ford*, 271 U.S. 187 (1962).

**Uniform Child Custody Jurisdiction Act (UCCJA)**

To address this problem, the National Conference of Commissioners on Uniform State Laws proposed the Uniform Child Custody Jurisdiction Act (1968)

(UCCJA). UCCJA established criteria for determining whether an enacting State has jurisdiction to award custody and visitation of a particular child and required the enacting States to recognize an award made by another State in substantial conformity with those jurisdictional criteria. The effectiveness of UCCJA "in interstate custody cases depends upon its adoption throughout the country." Statement of Senator Wallop, *PK Hearing, Subcomm. in Crim. Justice*, infra, p. 12. All states did not enact UCCJA. Louisiana adopted the UCCJA in 1978, Act 513 of 1978, LSA-R.S. 13:1700-1724. The States that had not adopted it continued to be havens for child-snatching parents. See statement of Senator Mathias, p. 2, of Senator Wallop, p. 12, and of Professor Coombs, p. 144, *PK Hearing, Subcomm. on Crim. Justice*, infra. Variations of UCCJA were enacted by states adopting it, undermining the uniformity and consistency among States needed on the basic questions of jurisdiction and duty of interstate enforcement. Statement of Professor Coombs, *PK Hearing, Subcomm. on Crim. Justice*, infra, p. 144. Therefore, UCCJA did not produce a comprehensive solution, and efforts focused upon resolving interstate custody disputes through federal legislation.

**Legislative History of PKPA**

A review of the proposals for a federal remedy for the problem is enlightening. The first proposals were to make parental kidnapping a federal crime. Next was Senator Wallop's three proposals to (1) impose the UCCJA jurisdictional standards on states as a federal duty, (2) make the Federal Locator Service available to States for the purpose of locating kidnapping parents, and (3) make it a federal crime for



a parent to kidnap his children. His first two proposals were adopted; the third was not, because of concerns of federal court *criminal* jurisdiction involvement in custody cases. Instead, 18 U.S.C. 1073 was made available to facilitate state prosecution of parental kidnapping. Nowhere (with the exception of the proposal of Rep. Fish, rejected by Congress) was it ever proposed that there be a private civil cause of action in a federal court for the enforcement of the 1738A duty upon the States.

In February 1973, Congressman Charles Bennett (Fla) introduced parental kidnapping legislation that would remove the parental exemption clause from the Federal Kidnapping Act, 18 U.S.C. §1201 (1976 & Supp. IV 1981), known as the Lindbergh Law, and make child stealing by a parent a misdemeanor. 123 CONG. REC. H1479 (daily ed. Feb. 24, 1977). A modified bill was introduced by Rep. Bennett in 1975. H.R. 113, 94th Cong., 1st Sess. (1975). These first proposals were defeated primarily because of the reluctance of legislators to classify parental kidnapping as a federal crime. H. R. 988, 95th Cong., 1st Sess. (1977), 123 CONG. REC. H54 (daily ed. Jan. 4, 1977)(remarks of Rep. Moss). Subsequent proposals were drafted in order to provide a determent, avoid the harsh criminal penalties, and still confer authority for FBI assistance in tracing abducted children. 124 CONG. REC. S502 (daily ed. Jan. 24, 1978). A bill incorporating the full faith and credit requirements and the jurisdictional provisions of UCCJA was introduced in the Senate in 1978 by Senator Wallop as an amendment to the Senate's Criminal Code Reform Act. 124 CONG. REC. S499-500 (daily ed. Jan. 24, 1978) The Reform Act was passed by the Senate on

January 30, 1978, but later stalled in conference committee. The Wallop proposal was then appended to the Domestic Violence Prevention and Services Act of 1980, H. R. 1977, 96th Cong. 2d Sess. (1980), which was passed by the House. 126 CONG. REC. S12051, 12066 (daily ed. Sept. 4, 1980). The Senate passed its own version of the Domestic Violence Act. 126 CONG. REC. S12051, 12061 (daily ed. Sept. 4, 1980) The Conference Committee declined to make parental kidnapping a separate federal crime, but modified the Wallop Amendment by permitting the Justice Department to use an already existing federal criminal statute, 18 U.S.C. §1073 (Supp. IV 1980) to facilitate state prosecution of parental kidnapping. H.R. Rep. No. 1401, 96th Cong. 2d Sess. 21 (1980). The House passed the Conference Report Version of the Domestic Violence Prevention and Services Act, 126 CONG. REC. H 10400 (daily ed. Oct. 2, 1980), but the Senate tabled it on November 17, 1980, 126 CONG. REC. S14547 (daily ed. Nov. 17, 1980).

The Wallop proposal, S105, was next appended to H. R. 8406, a bill providing medical coverage for administering pneumococcal vaccine to the elderly. 126 CONG. REC. H11673 (daily ed Dec. 1, 1980). A companion bill, H. R. 1290, was introduced in the House by Rep. Bennett. The bill became law on December 28, 1980. 126 CONG. Rec. 12553 (daily ed. Dec. 30, 1980)

**Congress Neither Expressly nor Implicitly Created a Private Federal Cause or Right of Action, or Remedy, in PKPA**

In determining whether a federal statute that does not expressly provide for a particular private right of action nonetheless implicitly created that right, the



"task is one of statutory construction" in determining "whether Congress intended to create the private remedy," *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 91(1981). See, also, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979), *Merrell Dow*, supra, 3234-5, ftn. 9. "Factors relevant to this inquiry are the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies," *Northwest Airlines*, supra, 91.

There is nothing in the language of the PKPA itself, in its legislative history, nor in the purpose and structure of the PKPA statutory scheme, that remotely suggest that Congress intended to create a private right of action in a federal district court to determine the validity or invalidity of a state custody decree or to enforce state custody decrees.

The Congressional intent of imposing uniform standards on state courts regarding assertion of jurisdiction in custody matters, and of not creating a private right of action, is clearly reflected in the language of the Act.

PKPA §7(c)(1)-(6), 28 U.S.C. §1738A, declaring the general purposes of the Act, states that they are to "promote cooperation between State courts," promote and expand exchange of information "between states", facilitate the enforcement of custody and visitation decrees of "sister states," and avoid jurisdictional competition and conflict between "State courts," among others.

Congress was well aware of the long standing and consistent judicial interpretation of 28 U.S.C. §1738,

the full faith and credit implementing act, when it enacted 28 U.S.C. §1738(A) [Sec. 8 of the Act] to provide that "*The appropriate authorities of every State shall enforce* . . . any child custody determination . . . by a court of another state." (italics added) The PKPA likewise implements the full faith and credit clause of the federal constitution, but is restricted to a narrow class of actions, state court custody determinations. There should be clear and convincing evidence of Congressional intent before concluding that Congress intended to create a private federal right of action in this narrow class of actions, state custody decrees, while the same was denied, under 28 U.S.C. §1738, to the authenticated acts, records and judicial proceedings of all state and territorial courts in all other cases.

The Legislative history of the Act also negates such an intent. In all the hearings and floor debate, no sponsor or supporter suggested that the legislation conferred federal civil jurisdiction. Conversely, the original proposals expressly conferred federal *criminal* jurisdiction, by making parental kidnapping a federal crime. Concerns were expressed about federal court involvement in the prosecution of parental kidnapping cases if they were made federal offenses. See statements of officials of Department of Justice, FBI and HEW at *PK Hearing, Subcomm. on Crim. Justice*, infra, 21-51. See responses to these concerns by Senator Wallop, *PK Hearing*, infra, 170, and *PK Hearing, Subcomm. Crim. Justice*, Addendum 142, and of Professor Coombs, *PK Hearing, Subcomm. on Crim. Justice*, 154.

Senator Wallop described his proposal as follows:



> We have developed a three-prong approach to the child-snatching problem. In a nutshell, the three major interdependent sections of Sl05 make the full faith and credit clause applicable to specified custody determinations, enable the Parent Locator Service to locate children who have been snatched, and make it a federal crime for parents to kidnap their children.
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> More specifically, the first section amends title 28 of the United States Code by adding a new subsection 1738A. The new provision adopts the principle (sic) jurisdictional provisions of the UCCJA and, for the first time, *requires state courts to give full faith and credit* to custody determinations rendered by sister states consistent with these provisions.
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> *All states will be required to enforce and not modify*, except under specified circumstances, custody determinations *made by sister state courts* which exercise their jurisdiction in accordance with the provisions of this bill. It will be in the interest of every state to adopt these jurisdictional standards since, by doing so, their custody decrees would be entitled to full faith and credit. The uniform custody approach to custody cases embodied in this provision should markedly reduce the number of custody cases which are litigated in numerous states. This will have the desirable effect of conserving precious judicial time. (italics added)

Wallop, 15 *Trial* May 1979, 34, 36; see, also Senator Wallop Statement, *Parental Kidnap-*

*ping, 1979: Hearings Before the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources, 96th Cong. 1st Sess. 35, 164, 167.* (hereafter *PK Hearing*) See, also, statement of Senator Wallop, *PK Hearing, Subcomm. on Crim. Justice*, infra, 8 and 15.

Senator Cranston, in the *PK Hearing*, 2, supra, also stated:

> A companion bill, H. R. 1290, is pending in the House of Representatives.
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> These bills deal with the problem of child snatching in three ways.
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> First: They would implement the full faith and credit clause of the Constitution to require States to recognize the custody orders of other states.
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> Second: They would authorize the use of the existing Federal Parent Locator Service, which is presently limited to finding parents who default on their child support payments, for finding these missing children.
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> If the child has not been found after 60 days, the FBI could be called in.
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> Third: The legislation would make it a Federal offense for anyone, including a parent or agent of a parent, to kidnap and transport a child across State lines in violation of legal custody or visitation rights.

See, also, statement of Senator Bennett, *PK Hearing, Subcomm. on Crim. Justice*, infra, p. 18.



The careful balancing by Congress of state and federal interests and the distinctions observed between civil and criminal approaches to the problem are clearly stated by Professor Russell M. Coombs, of Rutgers University School of Law, who conceived the legislation, wrote the first several drafts of it, was Deputy Chief Counsel, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, United States Senate, and a witness during the development days of PKPA. Professor Coombs testified:

> The Wallop proposal is unique among the various proposals made over the years for Congressional action in the soundness of its conception, in the scope of its treatment of this problem, and *in the respect it shows for the proper division of rules between the state and federal governments and between civil and criminal approaches to the problem.* (italics added)
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> *Parental Kidnapping: Hearings on H.R. 1290 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 95th Cong. 2d Sess. 133* (Hereafter, *PKPA Hearing, Subcomm. on Crime*) See, also, Professor Coombs' statement at *PK Hearing, Subcomm. on Crim. Justice*, infra, 146. See, also, Coombs, "Interstate Child Custody: Jurisdiction, Recognition, and Enforcement," 66 *Minn. L.R.* 711, 854.

The legislative scheme adopted by Congress confirms that Congress did not intend that the §1738A duty imposed on states be enforceable in federal district courts, but in state courts. The Congressional

approach was three-pronged: (1) impose upon state courts the UCCJA jurisdictional requirements as a federal duty, (2) make the federal Parent Locator Service available to locate children, and (3) make it a federal crime for parents to kidnap their children in violation of a proper state court custody order. (This third "prong" was changed by the Conference Committee, supra, to substitute the use of 18 U.S.C. §1073 to facilitate state prosecution of parental kidnapping)

The deliberately limited Federal role in the statutory scheme was outlined by Senator Cranston, *PK Hearing, Subcomm. on Crim. Justice*, infra, at 20:

> By reserving the Federal role to the creation of a Federal Parent Locator Service and FBI investigation after a sufficient lapse of time, we hold Federal interference to a minimum.

The enforcement provisions for requirement (1), supra, were the provisions of (2) and (3). Children who had been kidnapped can be located through the Parent Locator Service, and the services of the FBI are available for their arrest and return. As noted, the first proposals to remedy the problem were in fact ones to make parental kidnapping a federal offense. Only later was it suggested that the UCCJA standards be imposed on states as a federal duty and that the use of the Parent Locator Service be made available to locate parents. It was at this juncture, the enforcement provisions of PKPA, that the clearest indication of Congressional intent appears. In addition to the bills to amend the Federal Kidnapping Act to make parental kidnapping a federal crime, there were pending in the 96th Congress at the time of the PKPA



Hearings two bills, H.R. 325 (by Mr. Fish) and H.R. 772 (by Mr. Vander Jagt) to confer upon each federal district court jurisdiction "of any *civil action* brought by a parent or legal guardian of a child for enforcement of a custody order against a parent of the child who, in contravention of the terms of the custody order, has taken the child to a State other than the State in which the custody order was issued." (italics added) Rep. Fish had previously introduced in the 95th Congress two identical bills on March 3, 1978, H.R. 9913 and 11273. Congressman Fish appeared before *PKPA Hearing, Subcomm. on Crime*, supra, in support of H.R. 325. The following colloquy occurred, and the Fish proposal was not adopted:

> MR. FISH:
>
> As an alternative to the imposition of criminal penalties, I have introduced H.R. 325, which would give U.S. district courts jurisdiction to enforce valid custody orders issued by State courts.
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> Now since the Congress has two alternative approaches—one criminal and one civil—to deal with this situation, I wanted to take this opportunity to familiarize you on how my proposal would work.
>
> My bill aims at getting around the problems caused by the fact that the full faith and credit clause does not attach to child custody cases. That is, H.R. 325 would allow the Federal courts to be used as the mechanism for the enforcement of an existing, valid custody order.

It would obviate the necessity of a parent who has been granted custody of going into the courts of another State, or maybe several States, as she tracks down her child in an effort to retrieve that child. Rather, the custodial parent would be able to utilize the nearest U.S. district court. This method should be quicker and cheaper for the custodial parent. There would be no further problems caused by the lack of applicability of the full faith and credit clause, nationwide jurisdiction is automatically achieved over the "offending" parent; and "process may be served in any State."

Under the scheme of H.R. 325, U.S. marshals would be brought in and utilized in the search to locate the "runaway parent" and missing child.

H.R. 325 would amend section 1332 of title 28, United States Code, dealing with the original jurisdiction of U.S. district courts in diversity of citizenship situations. The minimum $10,000 amount in controversy usually required in such diversity jurisdiction is not made applicable in custody cases.

The remedies under my bill would be civil rather than criminal. The equitable powers available to the Federal courts—whether they be habeas corpus, injunctions—can be tapped, including that of contempt, should the offending parent continue to disregard the terms of the initial custody decree being enforced by the Federal court.



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MR. CONYERS:

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Actually, Mr. Bennett would impose the obligation on State courts, and you would require the Federal courts to give full faith and credit to the decision.

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Could I just interject, the difference between the Bennett proposal and yours: You would have, enforcing the full faith and credit provision, the parties removed to a Federal court. Under the Bennett provision, his bill would impose the full faith and credit enforcement of the State court.

It seems to me that that is a very important difference. The Federal jurisdiction, could it not, Mr. Fish, result in the Federal court litigating between two State court decrees; whereas, in an alternate method previously suggested, we would be imposing the responsibility of the enforcement upon the State court, and thereby reducing, it seems to me, the amount of litigation.

Do you see any possible merit in leaving the enforcement at the State level, rather than introducing the Federal judiciary?

MR. FISH. Well, I really think that it is easier on the parent that has custody of the child to go to the nearest Federal district court—which in some cases will be one stop,

and just a few hours' distance—and have jurisdiction attached nationally, than it would to have to even discover which other State to go into.

MR. CONYERS. Of course you know that the Federal courts have no experience in these kinds of matters, and they would be moving into this other area. I am just thinking of the fact that they have "speedy trial" considerations, antitrust, organized crime, the RICO statute, bankruptcy matters, and here on the average of a 21-month docket, you would now be imposing custody matters which it seems might be handled in the courts that normally handle that, especially if we were going to implement the Uniform Child Custody and Jurisdiction Act, which I think is salutary. (pp. 110-12)

There could not be a clearer example of Congressional intent to reject the proposal that federal district courts be given civil jurisdiction to enforce state custody decrees.

Respondent also reurges the additional citations to the legislative history of PKPA in the well-reasoned and documented Opinion of the Ninth Circuit in the present case, whose inclusion in this brief is precluded by space limitations.

**Congress Did Not Intend to Supercede nor Supplement Existing State Remedies by Conferring Federal Jurisdiction in PKPA**

Nor is there any indication that Congress intended to supercede or to supplement existing state remedies by conferring federal civil jurisdiction. The contrary



is evident in the careful imposition of the federal duty on state courts, the express rejection of the proposal to confer federal civil jurisdiction, and the provisions for the enforcement of that federal duty, the use of the Federal Parent Locator Service, and the use of 18 U.S.C. §1073 to facilitate state prosecution of parental kidnapping. See statement of Senator Durenberger outlining these two mechanisms for the enforcement of custody decrees, at *PKPA Hearing, Subcomm. on Crime*, infra, 41. Congress was well aware of the increasingly burdensome caseload of federal district judges, of the "speedy trial" statutes, and "the average of a 21-month docket" alluded to by Mr. Conyers, and the various proposals to remedy these problems. Congress made a considered and deliberate decision in choosing the nature and extent of the federal remedy which it authorized for the enforcement of the federal mandate upon the state courts. Whether Congress should have authorized a greater or lesser federal remedy is not the issue. The issue is what Congress did or intended to do. Its action and intentions are clear.

In construing Congressional intent, there is a necessary assumption that there is no federal private cause of action, *Merrell Dow*, supra, 3234-5. "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide," *Merrell Dow*, supra, 3235, ftn. 10.

The problem, as perceived by Congress, was not that the States that had adopted the UCCJA were refusing to enforce its jurisdictional requirements, but that all States had not adopted the UCCJA. At the *PK Hearing*, supra, 167, on April 17, 1979, Senator Wallop reported that 32 states had adopted the

UCCJA. At the hearing on January 30, 1980, *PKPA of 1979, S.105: Joint hearing Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Comm. on Labor and Human Resources*, 96th Cong., 2d Sess., (hereafter, *PK Hearing, Subcomm. on Crim. Justice)* Professor Coombs reported that about 40 states had adopted PKPA. On June 24, 1980, at *PKPA Hearing, Subcomm. on Crime*, supra, Dr. Doris Freed reported that 44 states had adopted UCCJA. All 50 states have now adopted UCCJA, eliminating the necessity for federal civil jurisdiction. Even Rep. Fish conceded that upon adoption of UCCJA by all the states his proposal to federalize the UCCJA might not be necessary and that "It may well be possible to condition the life of the legislation, such as a sunset provision, on the adoption of the uniform law by all the several States, which would have the same effect." *PKPA Hearing, Subcomm. on Crime*, supra, 12.

**Implication of a Federal Cause of Action is not Required to Accomplish Congress' Purpose in Enacting PKPA**

Implication of a federal cause of action is not required to accomplish Congress' purpose in enacting PKPA. *Cort v. Ash*, 422 U.S. 66 (1974). No court or commentator has suggested or documented that state courts had failed to honor the federal full faith and credit requirements of 28 U.S.C. §1738. There is not any basis for the view that Louisiana courts and other State courts will fail to perform their constitutional duty and not comply with the Congressional mandate in 28 U.S.C. §1738A. In a number of cases, the Louisiana appellate courts have enforced foreign custody



decrees or held that Louisiana lacked jurisdiction under the UCCJA or PKPA to modify them. See *Byrum v. Hebert* (App. 1982) 425 So. 2d 322; *Gibson v. Gibson* (App. 1983) 429 So. 2d 877; *DeLee v. Koss* (App. 1983) 430 So. 2d 196; *Wachter v. Wachter* (App. 1983) 439 So. 2d 1260; *Schroth v. Schroth* (App. 1984) 449 So. 2d 640; *Ingram v. Ingram* (App. 1985) 463 So. 2d 932; *Thomisee v. Pearson* (App. 1985) 465 So. 2d 259. In *DeLee v. Koss*, supra, the Louisiana court held on non-federal grounds (the provisions of Louisiana's UCCJA), that Louisiana lacked jurisdiction to modify the visitation provisions of a Colorado judgment, although having jurisdiction to enforce the custody award itself.

Dr. Thompson argues that the lower court's ruling renders the PKPA nugatory, grants the states authority optionally to comply with the PKPA provisions, leaves affected parents with no lawful means of enforcing a state custody judgment, and relegates them to self-help. Not so. The present decision does not bar a litigant from a federal court review of his full faith and credit claim or other claim asserted under a federal statute, U.S. Constitution, or U.S. Treaty. This Court has reviewed and decided a number of full faith and credit cases involving divorce, custody, and support decrees. Among many others, see *Williams v. North Carolina* 317 U.S. 287 (1942); *Williams v. North Carolina*, 325 U.S. 226 (1945); *New York Ex. Rel. Halvey v. Halvey*, 330 U.S. 610 (1947); *May v. Anderson*, 345 U.S. 528 (1952); *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Kovacs v. Brewer*, 356 U.S. 604 (1958); *Webb v. Webb*, 451 U.S. 493 (1981).

The only requirement for a federal review of a full faith and credit claim under 28 U.S.C. §1738 is that the petitioner have specifically set up or urged the federal full faith and credit claim in the state courts. *Webb v. Webb*, supra. In *Webb*, this Court outlined the strong policy reasons supporting the rule: concerns for comity between federal and state judicial systems, the opportunity for state courts to perform their duty, the opportunity for developing the record necessary for adjudicating the issue; the opportunity for state courts to construe state statutes so as to avoid or obviate federal constitutional challenges; the opportunity to determine if there are independent and adequate state grounds that would pretermit the federal issue, and if so, the opportunity for a state court to identify them and act upon them in an authoritative manner, all of which factors result in a reduction of the workload of the federal court system. These *Webb* policy reasons are equally applicable to 28 U.S.C. §1738A.

The lower court has noted the incomplete nature of the state court record in the present case and the resulting factual disputes, in footnotes 1 and 2 and the text footnoted 19.

Dr. Thompson has not presented his full faith and credit claim asserted under Sec. 1738A to any state court for determination under the principles announced in *Webb* prior to seeking relief in a federal court. For all the policy considerations and reasons assigned in *Webb* and other cases, he should be required to comply with these *Webb* prerequisites. The repeated assertion in Petitioner's Brief that, prior to Louisiana assuming jurisdiction, the California judge telephonically advised the Louisiana judge of California's desire to retain jurisdiction and that Louisiana nonetheless assumed jurisdiction (Pages 3, 4, 7, 18, 19) and the assertion that Respondent filed the Louisiana proceedings because Investigator Foran let it be known that her recommendation to the California Court would be to add a change of custody from Respondent to Petitioner (Pages 3, 19) are totally without support in the record and are denied by Respondent. Petitioner could have appeared in the Louisiana proceedings (of which he was timely and properly notified under the UCCJA) and urged his full faith and credit (PKPA) claim. The assertion of the California trial judge that Louisiana is "hostile territory" and Dr. Thompson's assertion that he "would have had no chance of success" (P Brief 19) is totally unsupported by the record or the history of UCCJA and PKPA cases in Louisiana courts. A possible result would have been that his claim would have been sustained on state grounds (the Louisiana UCCJA), obviating any federal intervention, as occurred in *DeLee v. Koss*. If Louisiana had rejected his PKPA claim through a decision of its highest appellate court, he had adequate remedy for a federal review by writ of certiorari, 28 U.S.C. §1257, *Webb*, supra. Nor is he presently precluded from asserting his claim in a Louisiana state court. In addition, if Louisiana had no jurisdiction to enforce the California decree of December 4, 1980 and to modify its visitation provisions by temporarily curtailing David's visitation, an action would lie under Louisiana law for a nullity of that judgment for lack of subject matter jurisdiction, LSA-C.C.P. 2002(3)(R Opposition Brief App. 1a-2a). If the Louisiana court sustained his jurisdictional attack on the basis of local law, Louisiana's UCCJA, federal intervention would be obviated.

*Webb*, supra. Additionally, the state proceedings would develop the factual record necessary for a federal adjudication of the claim, if that review became necessary.

The *Webb* considerations of comity, the maintenance of the delicate balance between federal and state judicial systems, and the proper function of each in child custody cases are just as important to the resolution of the issue in the present case. These considerations mandate that, before resorting to the federal court system, Dr. Thompson must attempt to enforce his judgment in the Louisiana court in order to determine whether or not Louisiana will grant it §1738A full faith and credit. If it does, he will never have to urge his §1738A full faith and credit issue in a federal court. If it does not, he has full recourse for a federal review of this claim.

Custody matters are an area basically the concern of the States, a cause of action traditionally relegated to state law. *Cort v. Ash*, supra, 78. The legislative history and statutory scheme of PKPA reveal the intention of Congress to leave it that way, subject to the federal standards imposed on the States and the two remedies provided. Congress manifestly did not intend to provide a federal cause of action in this state cause of action, *Merrell Dow*, supra.

The argument that the Federal courts possess civil jurisdiction in "virtual impasse" cases finds no basis in the legislative history of PKPA and none is cited. The argument is particularly inapplicable to the present case, in which no impasse, "virtual" or actual, has been demonstrated, because Dr. Thompson has never attempted to enforce his California judgment in Louisiana. Neither the language, purpose nor legislative history of PKPA demonstrates the intent to confer such civil jurisdiction when and only when there is such a "virtual" impasse between States. Such a distinction is not to be found If there is federal civil jurisdiction, it is of type Rep. Fish proposed, and every federal district court is open to every parent who has obtained a state court custody judgment for the enforcement of that judgment, whether or not another state has issued a conflicting custody judgment.



Permitting a parent to institute proceedings in the nearest federal district court for the enforcement of his custodial decree, whether or not there exists another conflicting state custodial decree, will result in a deluge of such cases. No parent would attempt to enforce his custodial decree in the court of another State; rather, he or she will obtain a state custody order, institute a suit in that parent's nearest federal district court for its enforcement, and compel the parent having physical custody to come to that forum to defend her right to custody. This is what Dr. Thompson is attempting to do in this case. There will be as much forum-shopping in the federal court system as there was in the state court system before the adoption of UCCJA and PKPA.

**Implication of a Federal PKPA Cause of Action Will Require Federal Courts to Become Enmeshed in the Underlying Custody Disputes**

Nor can a federal district court avoid becoming involved in the underlying custody factual dispute. As noted, Louisiana recognized the California decree of December 4, 1980, but temporarily curtailed appellant's visitation privileges, invoking jurisdiction under LSA-R.S. l3:1702A(3)(ii) (R Opposition Brief App. 1a),

a provision of Louisiana's UCCJA corresponding to California Civil Code Sec. 5l52(1)(c)(ii) (P Brief App. A2). Both of these sections confer jurisdiction on a state to make a child custody determination if the child is physically present in a state and it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent. 28 U.S.C. §1738A (c) (2) (C) (ii) is an identical provision, thus recognizing this same jurisdictional basis for a state court to make a custody determination. Under Sec. 1738A, if:

> State A meets the jurisdictional criteria for a "home State," set forth in Section 1738(c)(2)(A), and State B meets those of physical presence of the child coupled with necessity for his protection in an emergency resulting from his mistreatment, stated in Section 1738A(c)(2)(C)(ii), . . . both States have subject matter jurisdiction consistently with the criteria in Section 1738(c) . . . the case involves concurrent jurisdiction on the parts of two States consistently with Section 1738A(c).

*Joint Hearings on the Parental Kidnapping Act of 1979 Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary and the Subcomittee on Child and Human Development of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess. 8* (1980), testimony of Professor Russell M. Coombs. (herein, *PK Hearing, Subcomm. on Crim. Justice)*

In order for a federal district court to determine if Louisiana (State B in Professor Coombs' illustration) had properly exercised its jurisdiction, it would have to hear evidence and determine if the allegations of mistreatment of Matthew by Dr. Thompson set out in Articles 10-22 of Respondent's petition filed March 24, 1981, (JA23-29) and upon which an extended hearing was held, were in fact true. This would require the federal district court to become "enmeshed in the underlying custody dispute," *Flood v. Braaten*, 727 F. 2d 303 (3rd Cir. 1984), and compel it to render a decision on the underlying custody issue. In this case, the court could not limit itself to a "preliminary inquiry into jurisdictional facts," *Flood*, supra, at p. 310, because the facts conferring jurisdiction are the same facts deciding the underlying dispute concerning the welfare and custody of Matthew.



A federal district court would likewise become enmeshed in the underlying and undergirding factual disputes when jurisdiction was invoked in a state court under other sub-parts of Subsection (c) of §1738A, requiring factual determinations of "best interest of the child," "significant connection" of the child and parents with the State, and "availability in such State of substantial evidence concerning the child's present or future care, protection, training and personal relationships," §1738A(c)(2)(B), or whether "the child has been abandoned," §1738(A)(c)(2)(C)(i), or that "it is in the best interest of the child that such court assume jurisdiction," §1738(A)(c)(2)(D)(ii), in these disjunctive bases for a State court's assertion of original child custody jurisdiction. See *Rogers v. Platt* (CADC 3/1l7/87) No. 86-7011, ___ F 2d ___. Congress wisely decided that the determination of such matters should remain with state courts, subject to the federal §1738A full faith and credit mandate imposed on those

State courts. Federal courts are not equipped for such fact-finding issues in custody matters; state courts are, frequently having available investigative staffs, testing facilities or resources, state agencies, and other assistance and aids particularly suitable for custody determinations.

**No Showing Has Been Made that Federal Courts can Resolve Custody Jurisdictional Issues More Expeditiously than State Courts**

It is correctly argued that time is of the essence in custody disputes. However, there is no indication at all in the legislative history of PKPA that delay in State court custody adjudications was a problem sought to be addressed by Congress in PKPA. Additionally, the argument that federal courts can more expeditiously resolve the jurisdictional issues than can State courts is not supported by the statistics. The median time interval (for 80% of the cases) from filing to disposition of federal question cases tried and terminated by federal district courts for the twelve month period ending June 30, 1985, excluding land condemnation, prisoner petitions, and deportation reviews, was 19 months. 10% were terminated in less than 6 months; 10% took more than 42 months. *Annual Report of the Director of the Administrative Office of the United States Courts (1985), An Analysis of the Workload of the Federal Courts for the Twelve Month Period Ended June 30, 1985*. Most States, including Louisiana, handle custody matters more expeditiously than this at the trial court level through summary dockets or calendars. See LSA-C.C.P 2591, 2492(8), 2595 for summary disposition of child custody matters in Louisiana (App. 1a)



Congress consciously elected not to create in PKPA private relief in the federal district courts, nor expand their civil jurisdiction, for the enforcement of state custody decrees. On the other hand, it elected to impose the enforcement of the full faith and credit mandate on the state courts, limiting federal intervention to the use of the Federal Parent Locator System, the use of 18 U.S.C. §1073 in parental kidnapping, and 28 U.S.C. §1257 review. Congress is the final arbiter of federal district court jurisdiction, and it chose not to confer civil federal court jurisdiction in PKPA. Respondent concurs with the observation in *Rogers v. Platt*, supra, that the contrary conclusions in *Flood v. Braaten*, supra, and its progeny "are not supported by anything Congress said or did and that they reflect only a judicial view of wise public policy."

**CONCLUSION**

The judgment of the Court of Appeals for the Ninth Circuit is correct and should be AFFIRMED.

Respectfully submitted,

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# APPENDIX

# APPENDIX

## Louisiana Code of Civil Procedure:

## BOOK V
## SUMMARY AND EXECUTORY PROCEEDINGS
## TITLE I
## SUMMARY PROCEEDINGS

Art. 2591. Proceedings conducted with rapidity

Summary proceedings are those which are conducted with rapidity, within the delays allowed by the court, and without citation and the observance of all the formalities required in ordinary proceedings.

Art. 2592. Use of summary proceedings

Summary proceedings may be used for trial or disposition of the following matters only:

* * * *

(8) The original granting of, subsequent change in, or termination of child custody, alimony, child support in behalf of minor children, support between ascendants and descendants, and visitation rights of grandparents and siblings.

Art. 2595. Trial; decision

Upon reasonable notice a summary proceeding may be tried in open court or in chambers, in term or in vacation; and shall be tried by preference over ordinary proceedings, and without a jury, except as otherwise provided by law.

The court shall render its decision as soon as practicable after the conclusion of the trial of a summary proceeding and, whenever practicable, without taking the matter under advisement.

# SUPPLEMENTAL

# BRIEF

Supreme Court, U.S.
FILED
SEP 25 1987
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CLERK

No. 86-964

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

DAVID A. THOMPSON,

*Petitioner*,

versus

SUSAN A. THOMPSON, AKA, SUSAN A. CLAY,

*Respondent*.

**On Writ of Certiorari**
**To The United States Court of Appeals**
**For the Ninth Circuit**

## SUPPLEMENTAL BRIEF FOR THE RESPONDENT

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## SUMMARY OF ARGUMENT

1.

In enacting PKPA, Congress did not intend to and did not grant federal district courts quasi-appellate jurisdiction to review and enjoin the enforcement of state court custody decrees.

2.

If this Honorable Court concludes that Congress, in enacting PKPA, both granted federal district courts jurisdiction and created a private federal right of action for the enforcement of PKPA, then the federal courts should abstain under the principles of federalism.

## ARGUMENT

This Supplemental Brief is filed pursuant to Rule 35.5 to present late authorities.

These late authorities are two cases published since the filing of Respondent's brief, *Rogers v. Platt*, , 814 F. 2d 683 (D.C. Cir. 1987), and *Pennzoil Co. v. Texaco, Inc.* 481 U.S. _____ (1987).

*Rogers v. Platt* involved conflicting custody decrees of the District of Columbia and State of California, both of which purported to assert jurisdiction consistent with the Parental Kidnapping Prevention Act (PKPA). The federal district court in the District of Columbia entertained an action to declare which of two state courts had jurisdiction under PKPA and held the California decree to be valid. The United States Court of Appeals for the District of Columbia Circuit reversed, holding that the district court lacked subject matter jurisdiction. It found "that in light of the legislative history (of PKPA), the words of the

statute and its location in the U.S. Code, the absence of any reference to federal courts was the product of a deliberate congressional judgment that the jurisdiction of the federal courts not be expanded." (at pp 695-6)

> We believe that when Congress passed the PKPA it had such a specific intent directed to the issue of federal jurisdiction—an intent *not* to confer power to interpret its provisions on the lower federal courts. *Rogers v. Platt,* supra, at p. 689. (Emphasis in original)

The court reached this conclusion after an exhaustive review of the language and legislative history of PKPA, the problem at which PKPA was directed (that all states had not adopted the UCCJA), the placing of the statute, §1738A, in the U.S. Code as an addendum to the full faith and credit provisions (§1738), the traditional American practice under which the whole subject of domestic relations belongs to the laws of the States and not to the laws of the United States, the traditional treatment of the full faith and credit clause, the effect on federal court dockets "already overburdened with cases of compelling *federal* concern," the problems resulting from requiring federal judges to become enmeshed in and to decide the underlying child custody issues that determine state court jurisdiction under UCCJA and PKPA, and the express rejection by Congress of the Fish proposal to confer diversity jurisdiction on federal courts to enforce state custody decrees.

*Rogers v. Platt* correctly noted the incongruity in the position of the circuits granting federal jurisdiction and providing a federal remedy, noting "what



an unusual, indeed unique jurisdictional claim this is." (at p. 689) While conceding that PKPA does not grant "authority to any federal court to take original (or removal) jurisdiction of a custody action," these circuits assert that the federal jurisdiction arises "only *after* a state court allegedly commits an error in determining that asserting jurisdiction is consistent with the PKPA—as would apparently be so if courts of two different states both assert jurisdiction over the same custody dispute." (at p. 689) This "is quasi-appellate federal jurisdiction, a reviewing function somewhat akin to habeas corpus proceedings." (at pp 689, 690) Besides the anomalous result of a finding that Congress did not intend to grant federal court jurisdiction to *enforce* properly issued state custody decrees but intended to grant jurisdiction to *enjoin* improperly issued ones, such a grant of jurisdiction for "(f)ederal review of state court decisions so vividly encroaches on state sovereignty that it is normally exercised only by the Supreme Court. *Cf. Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 338-50, 4 L. Ed. 97 (1816). Not only can we not find, as we have discussed, any congressional intent to support this extraordinary grant of appellate jurisdiction, we think, in light of its unique character, it should not be easily inferred. Congress never having granted federal courts this type of jurisdiction, is not likely to do so without explicit direction." (at pp 694, 695)

Nowhere in the language or legislative history of PKPA is there the slightest indication that Congress intended to confer this extraordinary quasi-appellate jurisdiction on federal district courts to review the decisions of state courts in custody matters.

This Honorable Court has on many occasions held that a federal district court may not review a judgment of a state court. That authority lies in the Supreme Court:

> It is a well-settled principle that federal appellate review of judgments rendered by state courts can only occur in this Court, on appeal or by writ of certiorari. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482, 75 L. Ed 2d 206, 103 S. Ct 1303 (1983); Rooker vs. Fidelity Trust Co. 263 U.S. 413, 416, 68 L. Ed 362, 44 S. Ct 149 (1923); see also Atlantic Coast Line R. Co. v. Locomotive Engineers, 398 U.S. 281, 296, 26 L. Ed 2d 234, 90 S. Ct 1739 (1970).
>
> *Pennzoil Co. v. Texaco, Inc., supra,* at ___, Marshall, J., concurring in the judgment.

Respondent submits that the opinions in *Rogers v. Platt* and the Ninth Circuit in the case at bar are more thorough in reviewing the legislative history of PKPA and better reasoned than are the opinions of the other circuits.

As noted by *Rogers v. Platt*, supra, none of the four circuits holding that federal jurisdiction lies in this type of case has concluded that Congress created an implied right of action when it passed section 1738A. The Ninth Circuit, in the present case, held that federal jurisdiction lies, but that Congress did not create an implied right of action. *Rogers v. Platt* held that the federal court lacked subject matter jurisdiction, not reaching the implied right of action issue. Respondent asserts that there is neither under



PKPA, because Congress did not expressly nor impliedly create either. The Concurring Opinion of Edwards, J., in *Rogers v. Platt*, supra, is to the point:

> The main point here is that the language and legislative history of the PKPA make it clear that, whatever rights and duties may arise under the statute, the federal district courts have no jurisdiction to enforce them. (at p. 697)

One of the reasons assigned as supporting federal jurisdiction in *Flood v. Braaten*, 727 F. 2d 303 (3rd Cir. 1984) and its progeny was that a federal district court would not have to become "enmeshed in the underlying custody dispute," but could limit itself to a "preliminary inquiry into jurisdictional facts." *Flood*, at p. 310. Respondent's original brief, at pages 31-34, pointed out that in many cases, including the present case, the facts conferring jurisdiction on a state court are the same facts deciding the underlying custody dispute. In *Rogers vs. Platt*, the court noted

> "That is precisely what happened here; the district court felt obliged to resolve the jurisdictional dispute by weighing the value of the parties' connections to the two competing states, and in so doing the court seems to have preferred the claim of the natural mother to that of the adopting parents." (at pages 691, 692, and ftn. 11).

The fear that "enforcing the PKPA would ineluctably enmesh federal courts in domestic relations matters," *Thompson v. Thompson*, 798 F. 2d 1547, at 1558-59 (9th Cir. 1986), was not an unfounded one, but a realistic one finding fruition in *Rogers v. Platt.*

In the brief of Appellant, he admits that he has not attempted in any way to enforce in Louisiana his California custody degree, relying on the unsupported assertion that Louisiana is "hostile territory" and that he "would have had no chance of success" (Plaintiffs Brief 19, Respondent's Brief 29). Respondent's Brief, at pages 26-31, outlines Louisiana's recognition of and compliance with its constitutional duty in UCCJA and PKPA cases. Like Texaco in *Pennzoil v. Texaco, Inc.*, supra, at p.____ appellant's denignations of the Louisiana courts and their administration of justice hardly come from him with good grace, as he made no effort under Louisiana law to secure the relief sought in this case.

> Accordingly, when a litigant has not attempted to present his federal claims in related state court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.
>
> *Pennzoil Co. vs. Texaco, Inc.*, supra, at ___ .

If the court should conclude that Congress intended to and did create jurisdiction in federal district courts to review the judgments of state courts and created a private federal right of action in PKPA, then Respondent submits that the federal courts should abstain under the principles of federalism enunciated in *Younger v. Harris*, 401 U.S. 37 (1971) or *Railroad Comm'n of Texas vs. Pullman Co.*, 312 U.S. 496 (1941). The States' interest in the welfare of minor children within their boundaries is not negligible but important and substantive. The federal standards of



PKPA are imposed upon the states, not private parties. The federal claims in this case are inextricably intertwined with the underlying state custody issues, and a federal district court is in essence being called upon to review the state court decision. *Pennzoil Co. vs. Texaco, Inc.*, supra at _____, ftn 9; Marshall, J., concurring in the judgment at _____; Stevens, J., concurring in the judgment, at _____, ftn. 2.

## CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit is correct and should be AFFIRMED.

Respectfully submitted,

KENNETH RIGBY
Counsel of Record for
Respondent

# AMICUS CURIAE

# BRIEF

MOTION FILED
MAR 12 1987

86-964

No. 86-694

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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DAVID A. THOMPSON,

*Petitioner*

v.

SUSAN A. THOMPSON, aka SUSAN A. CLAY,

*Respondent*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF AMICI CURIAE SACRAMENTO COUNTY, CALIFORNIA IMPERIAL COUNTY, CALIFORNIA NATIONAL COUNCIL FOR CHILDREN'S RIGHTS, INC. WILLIAM M. HILTON, ESQ. COUNTY SUPERVISORS ASSOCIATION OF CALIFORNIA NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN LOS ANGELES COUNTY, CALIFORNIA IN SUPPORT OF PETITIONER

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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No. 86-694

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DAVID A. THOMPSON,

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v.

SUSAN A. THOMPSON, aka SUSAN A. CLAY,

*Respondent*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

---

## MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER

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Imperial County, California, Sacramento County, California, the National Council for Children's Rights, Inc., William M. Hilton, Esq., the County Supervisors Association of California, the National Center for Missing and Exploited Children, the National Association of Counsel for Children and Los Angeles County, California ("Amici Curiae") hereby respectfully move for leave to file the attached brief amici curiae in support of petitioner. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for respondent was requested but refused.

The Amici Curiae's interest in this case stems from the significance of the issue before this Honorable Court. That issue is whether federal courts can exercise juris-

diction to determine which of two state courts has correctly applied the Parental Kidnapping Prevention Act of 1980 ("PKPA").

The Ninth Circuit found that federal courts cannot exercise such jurisdiction. This finding impacts the effectiveness of the PKPA in resolving interstate jurisdictional disputes in child custody cases. Each of the Amici Curiae has considerable experience with the consequences of such disputes and each has a compelling need to seek effective means of resolving such disputes. This experience and this need give the Amici Curiae a broader perspective than the parties. The presentation of this perspective will permit a fuller and more complete analysis of the issue raised.

Respectfully submitted,

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March 12, 1987

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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No. 86-694

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DAVID A. THOMPSON,
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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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**BRIEF OF AMICI CURIAE SACRAMENTO COUNTY, CALIFORNIA IMPERIAL COUNTY, CALIFORNIA NATIONAL COUNCIL FOR CHILDREN'S RIGHTS, INC. WILLIAM M. HILTON, ESQ. COUNTY SUPERVISORS ASSOCIATION OF CALIFORNIA NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN LOS ANGELES COUNTY, CALIFORNIA IN SUPPORT OF PETITIONER**

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## INTEREST OF THE AMICI CURIAE

Imperial County, Sacramento County, and Los Angeles County are California counties which have been involved in continuing interstate jurisdictional controversies in child custody cases. Juvenile courts for these

Counties have placed dependent children out of state. In some instances, the out of state physical custodians have refused to return the child and were able to persuade the other state's juvenile court to exercise jurisdiction in an attempt to avoid returning the child. Resort to federal courts is the only means of resolving such interstate controversies and the Ninth Circuit's decision in this case would deny access to the federal forum.

The National Council for Children's Rights, Inc. is a non-profit, tax exempt organization dedicated to provide advocacy, education and research for the furtherance of children's welfare and children's rights. The Ninth Circuit's decision in this case would adversely affect the welfare and rights of children who become entangled in an interstate jurisdictional dispute over custody.

William M. Hilton is a certified family law specialist. He is the former chairperson of the Custody-Visitation Committee (North) of the State Bar of California. Mr. Hilton has represented litigants in child custody disputes throughout the United States and is understandably interested in stability and predictability in custody orders. The Ninth Circuit's decision in this case would undermine such stability and predictability.

The County Supervisors Association of California ("CSAC") is an incorporated statewide association representing California's fifty-eight counties. Every county is governed by a board of supervisors and these supervisors comprise CSAC's membership.

CSAC provides legislative advocacy, litigation support, public relations and other information services to its membership. In addition, CSAC participates in litigation affecting or of interest to its membership. Unresolved interstate jurisdictional disputes in child custody cases adversely affect, in varying degrees, the children, the parents, the state courts, the county social services staff and the county law enforcement officials that become embroiled in them. Without a means of resolving



these disputes, these adverse effects will continue. The Ninth Circuit's decision would eliminate an effective and necessary means of resolution of interstate jurisdictional controversies.

The National Center for Missing and Exploited Children ("Center") is a private, non-profit corporation which has entered into a cooperative agreement with the United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention to perform certain functions mandated by the Missing Children's Assistance Act of 1984 (P.L. 98-1473, 18 U.S.C.A. § 20). Among the functions that the Center is to perform under this cooperative agreement is the establishment of a national resource center and clearinghouse to provide technical assistance to local and state governments, public and private non-profit agencies, and individuals in locating and recovering missing children; to coordinate public and private programs which locate, recover, or reunite missing children with their legal custodians; and to provide technical assistance to law enforcement agencies, state and local governments, elements of the criminal justice system, public and private non-profit agencies, and individuals in the prevention, investigation, prosecution, and treatment of missing and exploited child cases. The term "missing child" has been defined by Congress to include parentally kidnapped children.

Pursuant to the terms of the cooperative agreement, the Center provides technical assistance to its constituent groups in locating children withheld from their legal custodians, and legal technical assistance in methods of recovering the child and enforcing custody decrees. As of December 31, 1986, the Center had received 6580 telephone calls from individuals concerning possible cases of parental kidnapping. Also, as of that date, the Center was providing technical assistance in 4522 active cases of parental kidnapping. The Center is concerned that the decision by the Ninth Circuit in this case will under-

mine the stability of custody orders and the predictability of interstate enforcement of custody orders.

The National Association of Counsel for Children ("NACC") was founded in 1977 to improve legal protection for children. The purpose of the NACC is to provide training and information to child advocates and to establish a strong foundation of member practitioners from varied professions who work with children affected by legal proceedings. The decision of the Ninth Circuit in this case has implications for all children caught in interstate jurisdictional disputes.

## SUMMARY OF ARGUMENT

In the past, kidnapping one's own child was the most effective means of insuring physical custody of that child pending the outcome of the custody battle with the other parent. Thus each parent had an incentive to resort to kidnapping. Another incentive was provided by the state courts as the kidnapper was usually rewarded with a favorable custody decree from the court of the state of his or her residence.

State legislation in the form of the Uniform Child Custody Jurisdiction Act ("UCCJA") was enacted to deter parental kidnapping. It proved ineffective because it allowed courts of different states to exercise jurisdiction concurrently. This led to Congressional passage of the Parental Kidnapping Prevention Act ("PKPA"). In order to eliminate jurisdictional competition and conflict between state courts, the PKPA mandated interstate enforcement and nonmodification of child custody determinations that conformed to the jurisdictional requirements set forth in the statute. To comply with this mandate, federal courts must be available to resolve jurisdictional disputes in those instances where a state court refuses to abide by the provisions of the PKPA.

Federal court access would be limited to determining which of two state courts that issued conflicting custody



determinations was acting in accordance with the PKPA. There would be no opportunity for the federal court to involve itself in the merits of the underlying custody dispute. The federal court would decide the questions of law and issue a declaratory judgment and other necessary relief based on this declaratory judgment.

Not only feuding parents, but also state juvenile courts, require federal court resolution of interstate jurisdictional disputes in child custody cases. Without the opportunity for federal court involvement for the limited purpose of resolving which of two state courts had properly applied the PKPA, the PKPA would impose duties under federal law with no effective means of enforcement.

## ARGUMENT

### I. The purposes for the PKPA are effectuated only by permitting access to federal courts in interstate jurisdictional disputes.

#### A. *Prior legislation was of limited effectiveness in resolving jurisdictional "gridlocks".*

Prior to the enactment of the Parental Kidnapping Prevention Act of 1980 ("PKPA"), 28 U.S.C.A. § 1738A, and its state law counterpart, the Uniform Child Custody Jurisdiction Act ("UCCJA"), California Civil Code Section 5150 *et seq.*, a parent often resorted to "self-help" to obtain physical custody of his or her child. The essence of this "self-help" remedy was to kidnap or "snatch" the child from the parent with custody and then flee to another state. The snatching parent frequently filed for custody in the new state, while the victim parent filed for custody in the child's former state, thus creating a jurisdictional contest between the courts of the two states. This contest became a "gridlock" as the competing state courts issued decrees in full knowledge that they contradicted the decrees of the court of the other state.

The loser in this process was clearly the child. There was no stability in the child's life as he or she was constantly used as a weapon by one parent against the other. Litigation of a custody decree in one state was followed by relitigation of that decree in another. The traumatic emotional toll inflicted on the child and the parents by years of this combat has been well documented. *See* "Child Snatching: A New Epidemic of an Ancient Malady, 103 J. Pediatrics 151 (1983) and M. Agopian, *Parental Child Stealing* (1981).

The UCCJA was adopted in various forms by state legislatures in every state to eliminate the legal advantage gained by use of the "self-help" approach. Unfortunately, the UCCJA had limited success in resolving interstate jurisdictional gridlocks because under the UCCJA concurrent jurisdiction to make initial determinations of custody could lie in two states. One state court had jurisdiction as the state where the child was living at least six months prior to the commencement of the proceedings. This state was labeled the "home state" of the child. If the child and one parent had a significant connection to another state and if there was available in this second state substantial evidence concerning the child's present or future care, protection, training and personal relationships, then this other state also could have jurisdiction over custody of the child.

The predictable result was that courts in two states exercised jurisdiction and frequently entered conflicting decrees. Thus, the UCCJA did not eliminate the incentive for the "self-help" approach.

### B. *Congress passed the PKPA to facilitate the interstate enforcement of custody determinations through legal means.*

The exercise of concurrent jurisdiction under the UCCJA as well as variations in UCCJA interpretation by courts of different states undermined its effectiveness.



This led to requests to Congress for federal legislation to deter parental kidnapping and require interstate enforcement of child custody decrees. *See* P. Hoff, J. Schulman, A. Volenik and J. O'Daniel, *Interstate Child Custody Disputes and Parental Kidnapping: Policy, Practice and Law* (1982), pp. 1-6.

In response to these requests, Congress passed the PKPA to discourage continuing interstate controversies, avoid jurisdictional competition and conflict between state courts and deter "self-help" remedies (Public Law 96-611, Findings and Purposes, Section 7(c)(4)(5) and (6)). In essence, the PKPA was enacted to eliminate the perceived need for "self-help" as a vehicle for obtaining or retaining custody. This need is eliminated by express language in the PKPA that gives a child's home state court exclusive, continuing jurisdiction unless that court declines to exercise it. This express language, which does not appear in the UCCJA, was intended to foreclose any opportunity for the exercise of concurrent jurisdiction over a child's custody by courts of different states. Under the PKPA, if the home state court is exercising jurisdiction consistently with the Act's provisions, then all another state court can do is enforce the home state court's decrees.

The language and purposes of the PKPA have been discussed by numerous federal courts. These courts have addressed the issue of whether they have jurisdiction under the PKPA to determine which of two inconsistent state court custody decrees was rendered in compliance with the PKPA. The citations for twenty-one of these decisions are set forth in the Appendix to this brief. The overwhelming majority of these decisions support the conclusion that access to federal courts for the limited purpose of resolving a jurisdictional contest between courts of different states is necessary to achieve the purposes and objects Congress sought to accomplish through passage of the PKPA. The overwhelming majority con-

cur with the analysis of the court in *Flood v. Braaten*, 727 F.2d 303, 312 (3d Cir. 1984), that the "one court at one time" purpose of the PKPA would be undermined without access to the federal courts. This "one court at one time" purpose allows only one state court to exercise jurisdiction over custody and the courts of all other states are obligated to enforce and not modify child custody determinations made by this state court.

Of the federal circuit courts, only the Ninth Circuit in this case has specifically determined that the PKPA does not permit access to the federal courts for resolution of conflicting state court custody orders. The District of Columbia Circuit in *Bennett v. Bennett*, 682 F.2d 1039 (1982) and the Seventh Circuit in *Lloyd v. Loeffler*, 694 F.2d 489 (1982) are sometimes cited to support arguments that federal courts cannot determine which of two states has exercised jurisdiction to make a custody determination in accordance with the PKPA. However, the *Bennett* Court and the *Lloyd* Court were primarily concerned with tort actions based upon parental kidnappings. The question of whether the PKPA is a basis for access to federal courts to resolve two conflicting state court custody decrees was not before either Court.

In this case, the majority of the Ninth Circuit strained to find a means to avoid federal court involvement in the resolution of an interstate jurisdictional dispute. The majority recognized the limited effectiveness of the UCCJA and the purposes for passage of the PKPA, but placed more importance on its perception of the legislative intent for the PKPA than on the effectuation of its purposes. The lack of an express mention in legislative materials of a role for federal courts in the enforcement of the PKPA was a decisive factor in the majority's reasoning.

To further underscore its interpretation of the legislative intent, the majority quoted from floor debates of a



House subcommittee of a prior Congress. Since these floor debates also dealt with conflicting custody decrees of courts of different states, the majority gave considerable weight to the subcommittee's decisions following this debate even though neither of the two bills discussed during these debates was passed by that particular Congress.

The majority also placed emphasis on a letter from an Assistant Attorney General. This letter was determined by the majority to ". . . touch upon most of the factors relevant to a proper interpretation of PKPA" (*Thompson v. Thompson*, 798 F.2d 1547, 1557 (1986)).

The majority selectively used a scant legislative record to support its notion that federal courts ought to avoid involvement in interstate jurisdictional disputes. The purposes of the PKPA were ignored. Yet it is the purposes of a statute that have the primary significance in any interpretation of that statute. Even the literal meaning of a statute must yield when that literal meaning frustrates a statute's purposes. As Judge Learned Hand held in *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945):

> . . . it is one of the surest indexes of a mature and developed jurisprudence . . . to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

There can be no doubt of the purposes and objects to be accomplished by the PKPA. Congress has carefully spelled them out. Many federal courts from *Flood*, *supra*, at p. 310, to *Olmo v. Olmo*, 646 F.Supp. 233, 236 (E.D.N.Y. 1986) have recognized that federal courts have a necessary and appropriate role in resolving interstate jurisdictional disputes that arise under the PKPA. Absent federal court involvement, the PKPA would create duties under federal law with no effective means of enforcement.

### C. *An interpretation that the PKPA does not permit access to federal courts will lead to unacceptable results.*

This Court has previously held that statutes should be interpreted to avoid unreasonable results (*American Tobacco Co. v. Patterson*, 456 U.S. 63, 71, 71 L.Ed.2d 748, 757, 102 S.Ct. 1534 (1982)). Nevertheless, the Ninth Circuit has interpreted the PKPA in a manner that would foster unreasonable results.

As mentioned, one of the weaknesses in the UCCJA that led to the passage of the PKPA was the variations in interpretation of the UCCJA by different state courts. These variant interpretations allowed interstate jurisdictional disputes to continue unresolved. If federal courts cannot be called upon for the restrictive purpose of determining which of two state courts correctly interpreted and applied the PKPA, many such disputes will remain unresolved.

Some state courts have correctly applied the PKPA and thus avoided interstate jurisdictional conflicts. For examples, *see Peterson v. Peterson*, 464 A.2d 202 (Me. 1983) and *S. Frederick P. v. Barbara P.*, 454 N.Y.S.2d 202, 115 Misc.2d 332 (1982). Other state courts have not and in those instances the resulting conflicts can only be resolved by federal courts. *See* Appendix. *See also Peery v. Peery*, 453 So.2d 635 (La.App. 1984) and *Peery v. Peery*, 174 Cal.App.3d 1085, 219 Cal.Rptr. 882 (1985).

The *Peery* cases offer a classic illustration of the absurdity that can result from an interstate jurisdictional dispute. Each parent has a state court that supports his or her position. Neither state court places any credence in the orders of the other state court. Three years have passed and despite numerous trial court and appellate court proceedings in each state, the gridlock continues with no resolution in sight.



Without access to federal courts, disputes such as *Peery* are likely to continue. Under the Ninth Circuit decision in this case, the only neutral forum to resolve such disputes is this Court. Such a solution should be avoided if for no other reason than the time it would take for the dispute to reach the U.S. Supreme Court.

The passage of time aids the custodial parent and penalizes the non-custodial parent. As the jurisdictional gridlock drags on for years, the physical custodian is able to benefit from the bonding that takes place between him or her and the child. If the jurisdictional dispute is ever resolved, this bonding will make it practically impossible to remove the child from the physical custodian. Thus the person who is a success at kidnapping profits from his or her wrongdoing. Such was the unacceptable result under the UCCJA and such will be the unacceptable result under the PKPA if federal courts are unavailable to resolve interstate jurisdictional disputes between courts in different states over application of that Act.

The passage of the time that it would take a PKPA interstate jurisdictional dispute to reach this Court would add considerably to the disruptive effect that the dispute has on the child who is in the center of it. Where there are conflicting child custody determinations by different state courts, the child is left in legal limbo and prevented from settling into a secure custodial placement. This instability of a secure custodial placement causes the child enormous stress.

The Ninth Circuit's ruling in this case precludes any opportunity for prompt resolution of the interstate jurisdictional dispute and, as a result, the stress placed on the child would unnecessarily continue. The Ninth Circuit's decision also does nothing to reduce the child's vulnerability to parental "self-help". The interpretation of the PKPA by the Ninth Circuit will result in the con-

tinuance of these unreasonable and unacceptable burdens that are placed on the child who is in the center of an interstate jurisdictional dispute.

**II. Federal court resolution would not require involvement in the merits of the underlying child custody dispute.**

The Ninth Circuit in the majority opinion in this case expressed a concern that if federal courts became arbiters in PKPA jurisdictional disputes, then they will have to become embroiled in the merits of the underlying custody battle. The Ninth Circuit's concern is unfounded. The federal courts' task in PKPA cases is to determine if there are conflicting state court decrees and if so, which of the two state courts acted in conformity with the PKPA. Any factual disagreement involving the merits of the underlying custody battle will serve no purpose in the accomplishment of this task. Only jurisdictional facts will be of assistance to the federal courts and rarely is there any debate as to these facts. The facts of the cases cited in the Appendix support this conclusion.

In PKPA cases, a federal district court is usually asked to decide questions of law and then issue a declaratory judgment. Because of the lack of factual disagreements, no testimony is required and a prompt decision is possible. In *Templeton v. Witham*, 595 F.Supp. 770 (S.D. Cal. 1984), the federal district court issued its declaratory judgment less than six months after the complaint was filed. A prompt decision minimizes the emotional toll on the parents and the child.

The Ninth Circuit's majority opinion suggests a fear that federal courts will be turned into juvenile courts or divorce courts. This fear can be minimized by limiting federal court involvement in PKPA cases to resolving the jurisdictional gridlock. This resolution can be effected through the issuance of declaratory judgments pursuant to 28 U.S.C.A. § 2201. This declaratory judgment could



then serve as the basis for further relief including an injunction. (28 U.S.C.A. § 2202 and *Powell v. McCormack*, 395 U.S. 486, 499, 23 L.Ed.2d 491, 504, 89 S.Ct. 1944 (1969)).

Such an approach would not cause federal courts to become juvenile courts or divorce courts. It would not impose lengthy litigation requiring considerable discovery, numerous motions and long trials on an already overburdened federal court system. Instead, in the overwhelming majority of cases it would limit federal court responsibility in PKPA cases where an actual controversy between two state courts exists to resolving the questions of law, i.e., which state court correctly applied the PKPA.

The declaratory judgment approach would act as a deterrent to parents inclined to use the "self-help" remedy to create a jurisdictional gridlock. Federal courts could insure that this gridlock is short-lived by ordering speedy hearings pursuant to F.R.C.P. Rule 57. In this manner, federal courts would serve the limited, but very significant, purposes of the PKPA.

**III. State juvenile courts also need access to federal courts for resolution of interstate jurisdictional disputes.**

In some instances, state courts have resorted to federal forums to resolve interstate jurisdictional conflicts. The Imperial County Juvenile Court and the Sacramento County Juvenile Court have each requested federal court assistance concerning dependent children of the respective courts. The Imperial County case is described in *Templeton v. Witham*, 595 F.Supp. 770 (S.D. Cal. 1984). The Sacramento County case was filed in the Connecticut district court and has yet to be decided (*Sacramento County Juvenile Court v. Ortiz*, U.S. District Court for the District of Connecticut Case No. H-86-501-TEC).

In effect, California juvenile courts act as parents of dependent children since California law requires these

courts to declare a child to be a dependent child of that court when it is necessary to assure adequate care for the child (California Welfare and Institutions Code Section 300). In such circumstances, the dependent child may end up out of state either with the juvenile court's permission as in *Templeton* or without as in the Sacramento County case. As a result the potential for an interstate jurisdictional dispute exists.

In *Templeton* and in the Sacramento County case this potential was realized. The physical custodians in each case were able to persuade the courts of different states to exercise jurisdiction in an effort to block the child's return. The existence of the UCCJA and the Interstate Compact on Placement of Children ("ICPC"), California Civil Code Section 265, failed to prevent the resulting jurisdictional gridlock. Resort to federal court was the only hope of breaking the gridlock.

The presence of the ICPC in these cases is particularly noteworthy since it was adopted by states, as was the UCCJA, to avoid jurisdictional contests. Where an out of state placement is to be made by a juvenile court or other governmental agency, the ICPC requires the two states' ICPC administrators to concur in writing to the placement. This written concurrence recognizes that the sending state court will continue to have jurisdiction over the child custody determinations of the placed child. Despite this concurrence in *Templeton* and in the Sacramento County case, an interstate jurisdictional dispute was created in each case because of a failure of the receiving state's courts to give effect to this concurrence.

The Ninth Circuit, as a result of its decision in this case, vacated and remanded *Templeton* with instructions to dismiss for failure to state a cause of action. This result was based on the Ninth Circuit's decision in this case. However, in issuing its order in *Templeton*, the Ninth Circuit overlooked the involvement of the ICPC even though it had previously recognized that federal



courts have jurisdiction to decide interstate disputes over the interpretation of interstate compacts. *See League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 507 F.2d 517, 523 (9th Cir. 1974).

Therefore, not only parents, but state courts and state child protection/placement agencies need access to a federal forum in PKPA disputes. Without this access, the PKPA, like its state law counterparts the UCCJA and the ICPC, will prove powerless in its efforts to eliminate interstate jurisdictional contests in child custody cases.

## CONCLUSION

The public interest in avoiding interstate jurisdictional contests in child custody cases is compelling. The problems arising from parental kidnapping and conflicting sister state custody decrees provided the impetus for enactment of the PKPA.

If this federal law is to achieve its purposes, the decision of the Ninth Circuit should be reversed and remanded with directions that permit federal courts to resolve PKPA jurisdictional disputes between courts of different states. Otherwise, the PKPA cannot be effectively enforced.

Respectfully submitted,

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March 12, 1987

## APPENDIX

1. *Alexander v. Ferguson* 648 F.Supp. 282 (D. Md. 1986)
2. *Bennett v. Bennett* 682 F.2d 1039 (D.C. Cir. 1982)
3. *Cook v. Cook* 792 F.2d 57 (5th Cir. 1986)
4. *Davis v. Davis* 638 F.Supp. 862 (N.D. Ill. 1986)
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6. *Flood v. Braaten* 727 F.2d 303 (3d Cir. 1984)
7. *Heartfield v. Heartfield* 749 F.2d 1138 (5th Cir. 1985)
8. *Hickey v. Baxter* 800 F.2d 430 (4th Cir. 1986)
9. *Hooks v. Hooks* 771 F.2d 935 (6th Cir. 1985)
10. *Leyda v. Roach* 650 F.Supp. 951 (S.D. Ia. 1987)
11. *Lloyd v. Loeffler* 694 F.2d 489 (7th Cir. 1982)
12. *Martinez v. Reed* 623 F.Supp. 1050 (D. La. 1985)
13. *Maxie v. Fernandez* 649 F.Supp. 627 (E.D. Va. 1986)
14. *Meade v. Meade* 650 F.Supp. 205 (M.D.N.C. 1986)
15. *McDougald v. Jenson* 786 F.2d 1465 (11th Cir. 1986)
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17. *Rogers v. Platt* 641 F.Supp. 381 (D.D.C. 1986)
18. *Templeton v. Witham* 595 F.Supp. 770 (S.D. Cal. 1984)
19. *Thompson v. Thompson* 798 F.2d 1547 (9th Cir. 1986)
20. *Wyman v. Larner* 624 F.Supp. 240 (S.D. Ind. 1985)
21. *Yelverton v. Yelverton* 614 F.Supp. 528 (N.D. Ind. 1985)

# AMICUS CURIAE

# BRIEF

MOTION FILED
MAR 13 1987

No. 86-964

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1986

DAVID A. THOMPSON,
*Petitioner,*
v.
SUSAN A. THOMPSON, aka SUSAN A. CLAY,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF WOMEN'S LEGAL DEFENSE FUND, PARENTS WITHOUT PARTNERS, SUPPORT AND MARITA ROGERS IN SUPPORT OF THE PETITIONER

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*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF WOMEN'S LEGAL DEFENSE FUND, PARENTS WITHOUT PARTNERS, SUPPORT AND MARITA ROGERS

---

Women's Legal Defense Fund, Parents Without Partners, SUPPORT and Marita Rogers, hereby move for permission to file an *amicus* brief in the captioned case. This motion is being filed under Rule 36(3). Counsel for Petitioner has consented to the filing of this brief,[1] counsel for Respondent has not.

This case involves the serious question of whether the federal courts have jurisdiction over disputes arising under the Parental Kidnapping Prevention Act ("PKPA") when two states exercise conflicting jurisdiction over a child custody dispute or issue conflicting decrees. The interest of the *amici* is to communicate to the Court the

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[1] *See* letter dated March 2, 1987 from Ronald W. Weiss on behalf of David Thompson.

necessity of federal court jurisdiction over "virtual impasse" cases to assure the continued viability of the PKPA as a deterrant to child snatching and protracted interstate custody disputes.

The decision of this Court in the present case will have a significant and long-lasting impact on each of the *amici* organizations and their members and a direct effect on *amicus* Ms. Rogers. Women's Legal Defense Fund ("WLDF"), Parents Without Partners ("PWP"), and SUPPORT are all non-profit organizations with commitments to issues involving child custody. The members and supporters of each group and their children might be faced with the prolonged litigation and its destructive uncertainty engendered by virtual impasse cases if the Ninth Circuit decision is affirmed. Marita Rogers, a natural mother seeking to regain custody of her child, is currently involved in a virtual impasse case. The continued validity of the federal district court ruling as to which state has jurisdiction to decide the custody of her child would be called into question if the judgment of the Ninth Circuit is affirmed.

While *amici* do not question the parties' ability to present their concerns to the Court, the broad public interest involved in the proper interpretation of the PKPA requires a thorough discussion of every potential basis for federal court jurisdiction. The court below determined that there was no implied cause of action and thus no federal question jurisdiction over disputes arising under the PKPA. The parties to this case will undoubtedly analyze the question of whether there is an implied cause of action. However, such analysis does not completely address the question of whether there should be federal court jurisdiction over PKPA disputes. A PKPA "virtual impasse" case could fairly be said to satisfy either part of the well-pleaded complaint rule—that the federal law creates the cause of action *or* that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law. Every other circuit court to analyze the issue of federal question jurisdiction has held that actions involving the PKPA "arise under" that statute without relying upon the cause of action analysis. *See McDougald v. Jensen*, 786 F.2d 1465, 1480 (11th Cir.), *cert. denied*, 107 S. Ct. 207 (1986); *Heartfield v. Heartfield*, 749 F.2d 1138 (5th Cir. 1985); *Flood v. Braaten*, 727 F.2d 303, 307 (3d Cir. 1984). None of these decisions, however, presented the type of analysis of the second part of the well-pleaded complaint rule offered by *amici*.

*Amici* believe that their analysis of federal question jurisdiction and their presentation of additional facts relating to the virtual impasse case of Marita Rogers will assist the Court in its interpretation of the PKPA and the question of federal court jurisdiction over cases arising under the Act.

For the foregoing reasons, the request for permission to file an *amicus* brief should be granted.

Respectfully submitted,


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## QUESTIONS PRESENTED

1. Whether an implied federal cause of action exists under the PKPA when two states exercise conflicting jurisdiction over a child custody dispute or issue conflicting decrees.

2. Whether federal question jurisdiction exists since any claim for a right to relief under the PKPA necessarily depends upon resolution of a substantial question of federal law.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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No. 86-964

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DAVID A. THOMPSON,
*Petitioner,*

v.

SUSAN A. THOMPSON, aka SUSAN A. CLAY,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF OF AMICI CURIAE WOMEN'S LEGAL DEFENSE FUND, PARENTS WITHOUT PARTNERS, SUPPORT AND MARITA ROGERS IN SUPPORT OF THE PETITIONER

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### INTEREST OF THE AMICI CURIAE

This brief is filed on behalf of the Women's Legal Defense Fund ("WLDF"), Parents Without Partners ("PWP"), SUPPORT and Marita Rogers, an individual.

The Women's Legal Defense Fund, a national nonprofit membership organization based in Washington, D.C., was founded in 1971 to assist women in their efforts to gain equality under the law. In response to numerous requests for assistance on matters relating to child custody, WLDF has instituted the National Project on Women and Child Custody. Through this and other pro-

grams, WLDF provides technical assistance to attorneys, engages in nationwide fact gathering, analyzes current and proposed legislation and provides representation at the appellate level.

The interest of the Women's Legal Defense Fund in the present litigation is to assure that the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C. § 1738A (1982), retains its vitality as a deterrent to child-snatching and protracted interstate custody disputes. Because lengthy interstate custody battles are particularly destructive of families, WLDF has firmly supported the Uniform Child Custody Jurisdiction Act ("UCCJA"), 9 U.L.A. 116 (1979), a model state law, and the PKPA as necessary steps toward their prevention and effective resolution. The lengthy interstate custody battles which occurred prior to the PKPA, and still occur where two state courts have reached a virtual impasse, pose a particular problem for women. The disparate economic impact created by divorce places women at a financial and therefore a tactical disadvantage in any drawn-out interstate custody litigation.

Parents Without Partners, Inc. is a non-profit educational organization dedicated to the interests and welfare of single parents and their children. Founded in 1957, PWP has a membership of 180,000 single parents nationwide and in Canada and Switzerland. PWP is concerned with the best interests of children in single parent families and in seeing that single parents receive equitable treatment in social institutions.

PWP wants to assure that single parents in custody disputes have recourse to federal courts when state courts are not able to agree on jurisdiction. PWP believes that without such recourse, single parents and their children will suffer.

SUPPORT is a non-profit child custody and support advocacy and information group based in Pennsylvania.



Formed in 1979, SUPPORT provides non-clinical assistance relating to child custody and parental kidnapping issues in family court to clients unable to afford a private attorney. In addition, SUPPORT provides counseling and support to parents who are attempting to resolve custody and visitation problems between themselves without the intervention of the court. SUPPORT has an interest in seeing that the terms of the PKPA are properly enforced and that prolonged interstate custody battles are avoided.

Marita Rogers is the natural mother of an infant born in California and removed soon after birth to the District of Columbia by prospective adoptive parents. Both California and the District of Columbia asserted jurisdiction over the custody dispute. Ms. Rogers then sought declaratory and injunctive relief in federal district court regarding which of the two jurisdictions, that of birth or that of removal, could act consistently with the PKPA and render a custody decree. The United States District Court for the District of Columbia ruled that California rather than the District had jurisdiction under the PKPA to determine custody. That decision is currently on appeal before the United States Court of Appeals for the District of Columbia Circuit.[1]

Ms. Rogers has an immediate and direct interest in whether a claim alleging noncompliance with the PKPA arises under federal law. The continued validity of the determination as to which state has jurisdiction to decide the custody of her child would be called into question if the judgment of the Ninth Circuit is affirmed by this Court. Ms. Rogers also represents other natural parents who, in seeking to regain custody of their children from

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[1] *Rogers v. Platt*, 641 F. Supp. 381 (D.D.C. 1986), *appeal docketed*, No. 86-7011 (D.C. Cir. July 30, 1986). At oral argument, the appellate court requested supplemental briefing on the jurisdictional issue which is now before this Court.

out-of-state adoptive parents, may require a federal court determination as to which of two states has jurisdiction under the PKPA to render a valid and enforceable custody decree.

## SUMMARY OF ARGUMENT

In enacting the Parental Kidnapping Prevention Act ("PKPA")[2] Congress attempted to deter the incentive to child snatch created by the lack of uniformity in state court jurisdictional standards and the complete modifiability of custody decrees. Federal district court review is necessary to vindicate the rights conferred by the Act —to have one state determine custody and to have other states enforce that determination—when state courts have reached a virtual impasse by simultaneously asserting jurisdiction or by issuing conflicting custody decrees. Absent federal court jurisdiction there is no *effective* solution to the virtual impasse cases. The protracted litigation that would be required before a case would be ripe for review by this Court would be extremely harmful to the children themselves and those seeking custody.

A PKPA virtual impasse case could fairly be said to satisfy either part of the well-pleaded complaint rule—that the federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial federal question. First, there is a strong basis for a finding of an implied cause of action in the PKPA according to the test set forth in *Cort v. Ash*, 422 U.S. 66 (1975). The PKPA does create federal rights. While the legislative history is silent regarding federal court jurisdiction over impasse cases, a narrow cause of action triggered only by such impasses is consistent with the underlying purposes of the Act and would not inappropriately encroach on an area traditionally left to the states.

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[2] 28 U.S.C. § 1738A (1982).



Second, federal question jurisdiction exists whether or not there is an implied cause of action, because petitioner's right to relief under the PKPA necessarily depends upon resolution of a substantial question of federal law. Analysis of the virtual impasse cases arising under the PKPA in light of this Court's recent treatment of federal question jurisdiction in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 106 S.Ct. 3229 (1986), demonstrates that these cases raise a substantial federal question.

The nature of the federal interest at stake in virtual impasse cases is a significant one—the proper interpretation of the national jurisdictional standards of the PKPA. While Congress was silent on the question of a federal cause of action, finding federal question jurisdiction is appropriate. Congress, in enacting the PKPA, did not expressly omit a cause of action. Instead, Congress established a federally-created concept of jurisdiction, thereby illustrating an intent to have a substantial and overarching impact on state child custody actions. In addition, the problem of the virtual impasse under the PKPA raises special circumstances sufficient to justify federal court jurisdiction since state courts have been unable to resolve the problem themselves and because time is of the essence in custody disputes. There is no doubt that petitioner's right to relief—interstate enforcement of the California custody decree—necessarily depends on the resolution of a federal question and a proper construction of the provisions of the PKPA.

## ARGUMENT

### I. WHETHER LACK OF FEDERAL COURT JURISDICTION OVER ISSUES RAISED BY NONCOMPLIANCE WITH THE PKPA WOULD MAKE STATE COMPLIANCE WITH ITS PROVISIONS OPTIONAL, THEREBY RENDERING THE PKPA NUGATORY

Aside from the Ninth Circuit, every Federal Court of Appeals directly confronted with the issue has found in favor of federal court jurisdiction over disputes between states arising under the PKPA. By its terms the PKPA confers federal rights: "The right to have one state at a time determine . . . children's custody and the right to have other states enforce that determination unless modification is permitted by federal law." *Flood v. Braaten*, 727 F.2d 303, 313 (3d Cir. 1984). The absence of federal jurisdiction would render section 1738A "virtually nugatory by so restricting the availability of a federal forum that state compliance with the legislation would become optional." *Id.* at 312. *Accord Hickey v. Baxter*, 800 F.2d 430, 431 (4th Cir. 1986); *McDougald v. Jenson*, 786 F.2d 1465, 1475, 1477 (11th Cir.), *cert. denied*, 107 S. Ct. 207 (1986); *Heartfield v. Heartfield*, 749 F.2d 1138, 1141 (5th Cir. 1985) ("When the courts of two states assert that they have jurisdiction over a custody determination, it is clear that Congress' purpose in enacting the Act would be thwarted without some means of determining which state has the right to exercise its jurisdiction under the terms of the Act.").

Prior to enactment of the PKPA, a parent who was denied custody could snatch a child and search for a state that might give that parent custody or otherwise modify existing custody arrangements.[3] Such forum

[3] Each year between 25,000 and 100,000 children of broken marriages were kidnapped or snatched by parents attempting to gain custody. Parental Kidnapping Prevention Act of 1979, S. 105, Joint Hearing Before the Subcomm. on Criminal Justice of the Senate Judiciary Comm. and the Subcomm. on Child and Human



shopping was encouraged because child custody orders have always been considered to be modifiable if circumstances changed sufficiently. Moreover, courts have not interpreted the full faith and credit clause to require states to enforce modifiable foreign custody orders.[4] Thus, the court of the state to which a child-snatching parent turned could feel free either to entertain a new custody proceeding or to modify a custody decree despite the short length of time the child had lived in the state.

The extent of the child-snatching problem and the lack of uniformity in state custody laws spurred legislative action. The first response came in the form of a model state law, the Uniform Child Custody Jurisdiction Act ("UCCJA"). The UCCJA sought to limit the number of states having initial jurisdiction to grant custody and to strengthen the interstate enforceability of custody decrees. However, as of 1980, a uniform version of the UCCJA had not been adopted by a majority of the states, thus limiting its effectiveness. *See Flood v. Braaten*, 727 F.2d at 311. Moreover, the UCCJA, in practice, failed adequately to discourage concurrent exercises of jurisdiction.[5]

The extent and severity of the child-snatching problem called for an exercise of federal power to compel uni-

Development of the Senate Labor and Human Resources Comm., 96th Cong., 2d Sess. 10 (1980) (statement of Sen. Wallop). This estimate does not encompass the number of children who might be moved over state lines by prospective adoptive parents seeking custody rights against a natural parent.

[4] In *Ford v. Ford*, 371 U.S. 187 (1962), *Kovacs v. Brewer*, 356 U.S. 604 (1958), and *Halvey v. Halvey*, 330 U.S. 610 (1947), this Court established that any state having jurisdiction may modify a child custody order from another jurisdiction to the same extent as the court granting it.

[5] *See* Bodenheimer, *Interstate Custody, Initial Jurisdiction and Continuing Jurisdiction under the UCCJA*, 14 Fam. L.Q. 203, 215-19 (1981).

formity in child custody jurisdictional standards. The PKPA, therefore, requires states to enforce—and not modify—"any child custody determination made consistently with the provisions [of the Act] by a court of another state." 28 U.S.C. § 1738A(a).[6] Secondly, the PKPA prohibits concurrent jurisdiction where the first state court is exercising jurisdiction consistently with the terms of the Act. *Id.* at § 1738A(g). Thus, the legislation attempts to (1) limit original assertions of jurisdiction, and (2) prescribe that jurisdiction, once attached, is continuing and exclusive. The PKPA also was designed to close the jurisdictional loopholes of the UCCJA, exploited by some parents who removed a child from its "home State" and invoked jurisdiction in the removal state on the basis of a "substantial connection" to that forum.[7] To foreclose such efforts, the PKPA prioritized the bases of jurisdiction, making "home State" jurisdiction the predominant basis.

Unfortunately, the PKPA has not completely solved the problems it was enacted to meet. Virtual impasses have arisen under the PKPA when two state courts have asserted jurisdiction or issued conflicting custody decrees.[8] These impasses are not caused solely by the tra-

[6] For a custody decree to be enforceable in another state under the PKPA, a state court must have jurisdiction under its own laws, *id.* at § 1738A(c)(1), and under the federally-defined standards of the Act, *id.* at § 1738A(c)(2). The PKPA also provides for "continuing jurisdiction" in the state that meets these criteria. *Id.* at § 1738A(d).

[7] 126 Cong. Rec. 22,806 (1980) (remarks of Sen. Wallop).

[8] The virtual impasse cases do not always share the same procedural posture. In some cases, two states have issued conflicting custody decrees. This is the case of petitioner David Thompson. *See also McDougald v. Jenson*, 786 F.2d 1465 (11th Cir.), *cert. denied*, 107 S. Ct. 207 (1986); *DiRuggiero v. Rodgers*, 743 F.2d 1009 (3d Cir. 1984); *Flood v. Braaten*, 727 F.2d 303 (3d Cir. 1984); *Olmo v. Olmo*, 646 F. Supp. 233 (E.D.N.Y. 1986); *Davis v. Davis*, 638 F. Supp. 862 (N.D. Ill. 1986); *Wyman v. Larner*, 624



ditional state court preference for awarding custody to the local party. Rather, courts have occasionally reached virtual impasses due to disagreements over the interpretation of the PKPA provisions themselves.[9] In such situations federal court review provides for uniformity of interpretation, which is essential to accomplishment of the PKPA's purposes.

Absent federal court jurisdiction there is no *effective* solution to the virtual impasse cases which arise under the PKPA. The protracted litigation that would be required before a case would be ripe for review by this Court would be harmful both to children themselves and to those seeking custody.[10] Indeed, the Ninth Circuit

F. Supp. 240 (S.D. Ind. 1985). In other cases, state courts have made conflicting assertions of jurisdiction. This is the case of amicus Marita Rogers. *See also Heartfield v. Heartfield*, 749 F.2d 1138 (5th Cir. 1985); *Templeton v. Witham*, 595 F. Supp. 770 (S.D. Cal. 1984), *vacated*, 805 F.2d 1039 (9th Cir. 1986).

[9] The case of Ms. Rogers illustrates how courts can reach a virtual impasse. Ms. Rogers' child was taken directly from the hospital in California to the District of Columbia within days of his birth. The PKPA defines the "home State," the state entitled to initial jurisdiction, in the case of a child less than six months old, as the state where the child "lived from birth" with a parent or person with a right to custody. 28 U.S.C. § 1738A(b)(4). The question of whether a child could "live from birth" with a mother who never took him home from the hospital raises the issue of whether there is a home state within the meaning of the PKPA. If there is no home state, the basis for jurisdiction becomes whether the child or his parents, or at least one contestant, have a significant connection with the state other than mere presence. *Id.* at § 1738A(c)(2)(B). The Superior Court of the District of Columbia found the District to be the "home State," while the California court held it was California. The federal district court ultimately found that there was no home state under the terms of the PKPA, but that the child had more significant connections with the state of birth, California, than with the jurisdiction to which he had been removed.

[10] The length of time that would pass before review by this Court would be available would have great impact on which party

holding would thwart the very purposes of the PKPA—to deter child snatching and guarantee the interstate enforceability of properly issued custody decrees. If the possibility of concurrent jurisdiction were encouraged by a finding that there is no federal court review of impasse cases, state courts might be encouraged to entertain custody disputes without reference to the jurisdictional standards set forth by the PKPA. Children, who in their developing years require stability and structure in their lives, would suffer greatly from the prolonged uncertainty over which parent is entitled to custody.[11]

The resulting lengthy custody battles arising from two state courts exercising jurisdiction would be particularly disadvantageous to women. Divorce creates a disparate economic impact on men and women. Women often suffer drastic declines in per capita income and living standards.[12] Since women also tend to earn less than men, this places them at a particular financial and thus a tactical disadvantage in interstate custody battles.

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ultimately retains custody of the child. The party with physical custody of the child, for what by that time might constitute a majority of the child's lifetime, might inevitably be allowed to keep the child, regardless of whether that party had a legitimate right to custody at the initiation of the case.

[11] The prolonged litigation over custody that would arise from virtual impasse cases would place children in a "custody limbo." Numerous psychological studies have confirmed that at all stages of development children require stability and continuity in their living arrangements. Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child* 31-41 (2d ed. 1979).

[12] Recent studies in the economics of divorce indicate that a man's per capita income tends to rise 120 percent after divorce while a woman's per capita income falls by 33 percent. This shift in per capita income translates into drastic shifts in standards of living, with divorced men experiencing a 42 percent increase and women experiencing a 75 percent decrease. Wishik, *Economics of Divorce: An Exploratory Study*, 20 Fam. L.Q. 79, 97-98 (1986); *see also* Weitzman, *The Divorce Revolution* 323 (1985).



Federal court jurisdiction should shorten the time and lower the expenses generated by the litigation of virtual impasse cases.

## II. WHETHER AN IMPLIED CAUSE OF ACTION EXISTS UNDER THE PKPA WHEN TWO STATES EXERCISE CONFLICTING JURISDICTION OVER A CHILD CUSTODY DISPUTE OR ISSUE CONFLICTING DECREES

The federal question statute, 28 U.S.C. § 1331 (1982), gives district courts jurisdiction over all civil actions arising under the Constitution, laws or treaties of the United States. A claim "arises under" federal law if it appears from the face of a well-pleaded complaint "either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983); *see Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 106 S. Ct. 3229, 3232 (1986). A PKPA "virtual impasse" case could fairly be said to satisfy either part of the well-pleaded complaint rule.[13]

The first part of the rule is that the federal law creates the cause of action. A federal law can do this either expressly or by implication. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S.

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[13] The Ninth Circuit determined that it had no subject matter jurisdiction over the claims of the petitioner because the PKPA did not create a cause of action in federal court. Every other circuit court to analyze the issue of federal question jurisdiction has held that actions involving the PKPA "arise under" that statute without relying upon the cause of action analysis. *See McDougald v. Jenson*, 786 F.2d 1465, 1480 (11th Cir.), *cert. denied*, 107 S. Ct. 207 (1986) ("[T]he fact that we have not found an implied federal cause of action or federal remedy authorized by section 1738A will not affect federal jurisdiction in a case such as this."); *Heartfield v. Heartfield*, 749 F.2d 1138 (5th Cir. 1985); *Flood v. Braaten*, 727 F.2d 303, 307 (3d Cir. 1984).

353, 378 (1982). There is no express statement in the PKPA or its legislative history creating a federal cause of action. There is, however, a strong basis for finding an implied cause of action in the PKPA.

In *Cort v. Ash*, 422 U.S. 66, 78 (1975), this Court established a four-part test for determining whether a private cause of action is implicit in a statute not expressly providing for one. The court must determine: (1) whether the Act created federal rights; (2) whether Congress' view on a cause of action might be gleaned from the legislative history; (3) whether the implied cause of action is consistent with the Act's legislative scheme; and (4) whether the cause of action would encroach on an area traditionally left to the states.[14] An examination of each of these factors reveals that a private cause of action exists under the PKPA.

First, the PKPA created the federal "right to have one state at a time determine . . . custody and the right to have other states enforce that determination unless modification is permitted by federal law." *Flood v. Braaten*, 727 F.2d at 313. These rights derive from the sections of the PKPA that mandate that states not exercise jurisdiction during the pendency of a custody proceeding in another state and that they enforce interstate custody decrees. 28 U.S.C. § 1738A(a),(g). Petitioner David Thompson and amicus Marita Rogers possess these rights and thus belong to "the class for

[14] This Court has often found implied causes of action from silent statutes. In *Touche Ross & Co. v. Redington*, 442 U.S. 560, 569 (1979), this Court explained that in cases finding implied causes of action, the statute in question must at least prohibit certain conduct or create federal rights in favor of private parties. This Court went on to point out that implied causes of action had been found in *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (20 U.S.C. § 1681); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) (42 U.S.C. § 1981); *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971) (15 U.S.C. § 78j(b)).



whose *especial* benefit the statute was enacted." *Cort v. Ash*, 422 U.S. at 78.

Second, the legislative history of the PKPA reveals only that Congress did not expressly omit or create a federal cause of action.[15] The Ninth Circuit based its ruling that the PKPA contemplated no federal role whatsoever (other than review by this Court under 28 U.S.C. § 1257) largely on Congress' rejection of several bills introduced by Rep. Fish assigning federal courts jurisdiction to enforce custody decrees.[16] This portion of the legislative history does not merit such a broad reading.

[15] The expression of legislative intent need not be explicit. In *Cort v. Ash* this Court indicated that Congress' intent to create or deny a private cause of action could be either explicit or implicit. 422 U.S. at 78.

[16] According to the Ninth Circuit, the legislative discussions during the passage of the PKPA centered primarily around the ineffectiveness of the full faith and credit clause in child custody proceedings. The majority regarded these discussions and the perceived resemblance between the UCCJA and the PKPA as proof that the PKPA was designed solely to ensure that states give full faith and credit to the properly issued custody decrees of sister states.

Contrary to the assertions of the Ninth Circuit, the PKPA is not simply a deliberate copy of the UCCJA. The PKPA is more than a specialized full faith and credit statute. If it were only that, then there might be a basis for arguing that the PKPA, like the implementing statute for the full faith and credit clause (28 U.S.C. § 1738), could not be the source of federal court jurisdiction. *See Minnesota v. Northern Securities Co.*, 194 U.S. 48 (1904). However, the legislative history makes it clear that the PKPA was designed to be more than a federal enactment of the UCCJA. The PKPA closes the jurisdictional gaps in that model statute—gaps which allowed states to assert concurrent jurisdiction over initial custody determinations. 126 Cong. Rec. 22,806-07 (1980) (statement of Sen. Wallop). In addition, the language and structure of the PKPA clearly indicate that the Act was designed to address both the interstate enforceability of child custody decrees and the jurisdiction of state courts to issue such decrees. Both of these aspects of the PKPA are necessary to remedy the child-snatching problem.

The rejection of the Fish bills does not reach the issue of whether Congress intended to create or deny a federal cause of action under the PKPA.[17] Instead, it reflected Congress' intent to avoid eliminating the judicially created "domestic relations" exception to diversity jurisdiction.[18] The Fish bills would have conferred jurisdiction on federal courts to enforce state custody decrees in the *first instance*. This would have inserted the federal courts into areas which have traditionally been reserved for the states. These bills bear no resemblance to the PKPA as ultimately enacted. Thus, all that can be drawn from this portion of the legislative history is that Congress rejected the federal courts as "the court of first instance" in custody disputes and was silent on the "virtual impasse" situation.

Third, a private cause of action is consistent with the underlying purposes of the PKPA. Congress, in enacting the PKPA, adopted *and* modified the jurisdictional requirements of the UCCJA, thereby creating new federal standards for custody jurisdiction. In effect, Congress instituted a new concept of custody jurisdiction. *See Flood v. Braaten*, 727 F.2d at 312. It would be anomalous for Congress to have done this only to leave compliance with the new provisions of the PKPA to the discretion of the states where the problems caused by

[17] There was no plenary action whereby the Fish bills were submitted and rejected by the Congress as suggested by the Ninth Circuit. *See* House Legislative Calendar, Comm. on Judiciary, H.R. 1290, 96th Cong., 2d Sess. 76 (1980), *reprinted in* Cong. Index (CCH) 34,502 (1979-80, vol. 2).

[18] The Fish bills, H.R. 9913, 95th Cong., 1st Sess. (1977), H.R. 11273, 95th Cong., 2d Sess. (1978), would have amended 28 U.S.C. § 1332 to authorize diversity jurisdiction in custody cases and to eliminate the $10,000 minimum amount in controversy requirements. Parental Kidnapping: Hearing on H.R. 1290 Before the Subcomm. on Crime of the House Judiciary Comm., 96th Cong., 2d Sess. 9, 11 (1980) (statement of Rep. Fish).



exercises of concurrent jurisdiction were created in the first place.[19]

The only option Congress could have considered other than federal court review would have been review by this Court, pursuant to 28 U.S.C. § 1257, after a case worked its way through two state court systems. Both the heightened need in child custody cases for speedy resolution of jurisdictional conflicts and the crowded docket of this Court make this option, for practical purposes, the equivalent of denying parties any forum to remedy transgressions of the PKPA.[20] Given this lack of any other effective review, it appears clear that a federal cause of action, triggered only when there is a virtual impasse between two state courts, is consistent with the underlying legislative scheme of the PKPA.

Fourth, recognition of a private cause of action under the PKPA satisfies the final inquiry of *Cort v. Ash*—whether a private cause of action would inappropriately encroach on an area traditionally within the purview of state law. It is within the competence of the federal courts to decide which of two conflicting state decrees is valid. *DiRuggiero v. Rodgers*, 743 F.2d 1009, 1019 (3d Cir. 1984). Moreover, federal courts can determine which state has jurisdiction under the terms of the PKPA without becoming "enmeshed in the underlying custody dispute." *Flood v. Braaten*, 727 F.2d at 310. The PKPA provides specific rules to determine the one state forum

[19] Federal court jurisdiction over PKPA disputes offers the [redacted] a forum well-equipped to analyze the federal law and to accommodate the need for a speedy resolution of custody disputes. In the case of amicus Marita Rogers, on appeal, the federal circuit court moved quickly to is[redacted]d ordered expedited proceedings concerning which [redacted] jurisdictional standards of the PKPA.

[20] This was also the conclusio[redacted] reached by the Third Circuit in *Flood v. Braaten*, 727 F.2d at 312. The dissent in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 106 S.Ct. 3229 (1986), also concedes that section 1257 review is inadequate to ensure that federal law is interpreted and applied uniformly. *Id.* at 3242-43 n.6.

that can take jurisdiction to modify a custody decree and expressly disallows concurrent jurisdiction by state courts over custody issues. Under the statutory scheme of the Act, if two statutes concurrently assert jurisdiction or render custody decrees, one state has acted contrary to the provisions of the PKPA. Identifying which state has so acted requires only an analysis of jurisdiction, *i.e.*, which state meets the standards set by the PKPA. A federal court determination whether a state has properly exercised jurisdiction will not involve the court in the merits of the underlying case, *i.e.*, whether the custody decree is appropriate or in need of modification to protect the best interests of the child. *Flood v. Braaten*, 727 F.2d at 309-10; *DiRuggiero v. Rodgers*, 743 at 1019-20.[21]

## III. WHETHER FEDERAL QUESTION JURISDICTION EXISTS SINCE ANY CLAIM FOR A RIGHT TO RELIEF UNDER THE PKPA NECESSARILY DEPENDS UPON RESOLUTION OF A SUBSTANTIAL QUESTION OF FEDERAL LAW

Federal question jurisdiction exists over actions arising under the PKPA whether or not there is an implied cause of action. As this Court established in *Franchise*

[21] The Ninth Circuit's concern that a federal court would inevitably be drawn into the merits of the underlying custody dispute is unwarranted. The emergency clause of the PKPA (§ 1738A(c)(2)(C)), which the Ninth Circuit views as posing this problem, authorizes only *interim* custody awards. The basic jurisdictional dispute over which state is the proper forum is left to be resolved under the "home State" provision and, if there is no "home State," the "substantial connections" provision of the PKPA. A federal court presented with a true jurisdictional impasse need only consider which state has the jurisdiction required by the PKPA to become the court of initial and exclusive jurisdiction. See *Martinez v. Reed*, 623 F. Supp. 1050 (E.D. La. 1985), *aff'd without opinion*, 783 F.2d 1061 (5th Cir. 1986), in which the district court resolved the jurisdictional dispute under the "home State" clause of the PKPA without questioning the propriety of one state's interim custody award.



*Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 14 (1983), even where state law creates the cause of action, a case may "arise under" the law of the United States if a well-pleaded complaint establishes that the plaintiff's right to relief requires resolution of a substantial question of federal law in dispute between the parties. *See also Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921); *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964), *cert. denied*, 381 U.S. 915 (1965) ("[e]ven though the claim is created by state law a case may 'arise under' a law of the United States if the complaint discloses a need for determining the meaning or application of such a law.").[22] There are two components to this second part of the well-pleaded complaint rule: (1) plaintiff must plead a *substantial* federal question; and (2) his right to relief must *depend* upon resolution of that question.

Petitioner pled a substantial federal question by requesting a federal court to construe the jurisdictional and interstate enforceability provisions of the PKPA. Even if petitioner's underlying complaint is viewed as presenting a state cause of action (*i.e.*, the entitlement to custody), rather than stating an implied cause of action under the PKPA, his requests for declaratory and injunctive relief necessarily depend upon the judicial construction of these PKPA provisions.

An analysis of the virtual impasse cases arising under the PKPA in light of this Court's treatment of federal

[22] There have been numerous lower court cases that have relied on the proposition established in *Smith* and reiterated in *Franchise Tax Board* that federal law need not wholly or partially create the cause of action for there to be a finding of federal question jurisdiction. *See, e.g., Garvin v. Alumax of South Carolina, Inc.*, 787 F.2d 910, 913-15 (4th Cir. 1986); *Christopher v. Cavallo*, 662 F.2d 1082, 1083-84 (4th Cir. 1981); *Hanes Corp. v. Millard*, 531 F.2d 585, 595 n.8 (D.C. Cir. 1976); *Ivy Broadcasting Co. v. AT&T*, 391 F.2d 486, 492 (2d Cir. 1968); *Hayes v. National Con-Serv, Inc.*, 523 F. Supp. 1034, 1037 n.8 (D. Md. 1981).

question jurisdiction in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 106 S. Ct. 3229 (1986), demonstrates that petitioner has raised a substantial federal question. *Merrell Dow* concerned a state tort action involving use of the drug Bendectin. Plaintiff alleged as one of the elements of a state tort action violations of the Federal Food, Drug and Cosmetic Act ("FDCA").

This Court concluded that the federal interest at stake was not a sufficiently predominant element of the action to give rise to a substantial federal question and that significant "pragmatic and principled" considerations (*e.g.*, preserving the integrity of Congressional intent not to provide a federal cause of action) counseled against a finding of federal question jurisdiction. *Merrell Dow* emphasized that this Court was neither rejecting the *Smith* line of cases nor holding that federal law must wholly or partially create a cause of action. 106 S. Ct. at 3236 n. 12. Rather, *Merrell Dow* established that the inquiry concerning federal question jurisdiction must focus on the nature of the federal interest at stake and consider "principled, pragmatic distinctions" rather than whether the cause of action is federally created.

The "nature of the federal interest at stake" in claims for relief brought under the PKPA is far greater than that at issue in *Merrell Dow*. The virtual impasse cases are to be distinguished from the FDCA issues in *Merrell Dow* in the same way that this Court has distinguished *Smith* from *Moore v. Chesapeake & Ohio Railway*, 291 U.S. 205 (1934). In neither *Smith* nor *Moore* was there a federal cause of action, yet in *Smith* this Court found federal question jurisdiction. In *Merrell Dow*, this Court found the difference in result to be traceable to the difference in the nature of the federal interests at stake in each case. The plaintiff in *Moore*, like the plaintiff in *Merrell Dow*, pled the violation of a federal safety standard as a part of his state tort claim. The Court found that the alleged violation of a federal safety standard as



an element of a state tort did not "fundamentally change the state tort nature of the action" and thus did not present a substantial federal question.[23] By contrast, in *Smith* the federal issue on which the entire case turned was the constitutionality of the federal statute.

Here, petitioner's case similarly turns on an interpretation of the national jurisdictional standards of the PKPA. These jurisdictional provisions may fundamentally alter the course of any child custody case by removing the authority of any state court acting inconsistently with them to assert jurisdiction or to issue a valid and enforceable decree. Along the spectrum of substantiality reaching from *Moore* to *Smith*, the federal interest at stake in this case clearly falls closer to *Smith*.

This case is also distinguishable from *Merrell Dow* in that there are no pragmatic or principled considerations which rise to the level of those in *Merrell Dow*.[24] Even if this Court were to find no implied cause of action under the PKPA, that finding does not deserve the same weight as in *Merrell Dow*. 106 S. Ct. at 3236 (the finding that there was no federal cause of action was "tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal question jurisdiction"). In the case of the FDCA, Congress expressly omitted a private cause of action from the statute as enacted.[25] Moreover, there is

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[23] 106 S. Ct. 3229, 3236 n.12.

[24] This Court noted that in determining federal question jurisdiction in *Merrell Dow* it stressed principled and pragmatic distinctions. 106 S. Ct. at 3235.

[25] In enacting the FDCA, Congress did expressly address the federal cause of action issue by establishing an administrative body, the Food and Drug Administration, to enforce the provisions of the Act, and by consciously deleting a private cause of action provision from the final version of the bill that became the FDCA. *See, e.g.*,

nothing in the legislative history of the Act that indicates that Congress intended the FDCA safety standards to affect in any significant way the manner in which state courts resolved state tort actions. Given these considerations, finding federal question jurisdiction over FDCA claims would have flouted or undermined Congressional intent. 106 S. Ct. at 3234-35.

The same cannot be said regarding the impasse cases arising under the PKPA. Congress, in enacting the PKPA, did not expressly omit a federal cause of action. Instead, by establishing a federally-created concept of jurisdiction it created federal rights. Thus, Congress clearly intended the statute to have a substantial and overarching impact on state child custody actions. *See supra* at 13-14. Consideration of Congress' goals in enacting the PKPA, the impact of the statute on state child custody proceedings, and the lack of an express omission of a private federal cause of action counsels against according great significance to Congressional silence on the virtual impasse situation.

The PKPA admits a far greater federal interest in state child custody cases than does the FDCA in state tort actions. Indeed, there is no comparison between the two statutes. The FDCA simply established federal standards that could be incorporated into state law; it did not alter the nature of or the method by which a court would proceed to resolve state tort causes of action. In contrast, the PKPA was enacted to prevent a particular pattern of state court action that encouraged child snatching. The PKPA established federal jurisdictional standards that act as preconditions to the exercise of state jurisdiction and the interstate enforceability of any ensuing decree.

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*Keil v. Eli Lilly & Co.*, 490 F. Supp. 479, 480 (E.D. Mich. 1980); *Florida v. Eli Lilly & Co.*, 329 F. Supp. 364, 365 & n.2 (S.D. Fla. 1971).



Finally, in *Merrell Dow*, this Court left open the question of whether special circumstances could require federal court jurisdiction. 106 S.Ct. at 3237. The virtual impasse situation under the PKPA raises special circumstances sufficient to justify federal court jurisdiction. Federal court jurisdiction over PKPA jurisdictional conflicts is so essential because the virtual impasse situation is one that state courts, before and after the enactment of the PKPA, have not been able to resolve themselves[26] and because time is of the essence in custody disputes.[27]

There is no doubt that petitioner's right to relief depends on the judicial construction of the PKPA provisions dealing with initial jurisdiction and interstate enforceability. Under the PKPA, petitioner must show on the face of his complaint that his custody decree was made consistently with the relevant substantive provisions of the PKPA. *See McDougald v. Jenson*, 786 F.2d 1465, 1479-80 (11th Cir.), *cert. denied*, 107 S. Ct. 207 (1986). Therefore, petitioner's right to relief (*i.e.*, interstate enforcement of the California custody decree) necessarily depends on the resolution of a federal question and a proper construction of the provisions of the PKPA.

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[26] By contrast, in *Merrell Dow* there was no reason to believe that the state court could not interpret and apply the FDCA safety standards properly within the context of a state tort action.

[27] The prolonged litigation generated by PKPA impasse situations would only create prolonged uncertainty for both parents or for the natural and prospective adoptive parents and, of course, for the children themselves. This very real problem is a special circumstance within the meaning of *Merrell Dow* which counsels a finding of federal question jurisdiction.

## CONCLUSION

Wherefore, the Women's Legal Defense Fund, Parents Without Partners, SUPPORT, and Marita Rogers respectfully request that the judgment of the United States Court of Appeals for the Ninth Circuit be reversed.

Respectfully submitted,

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